



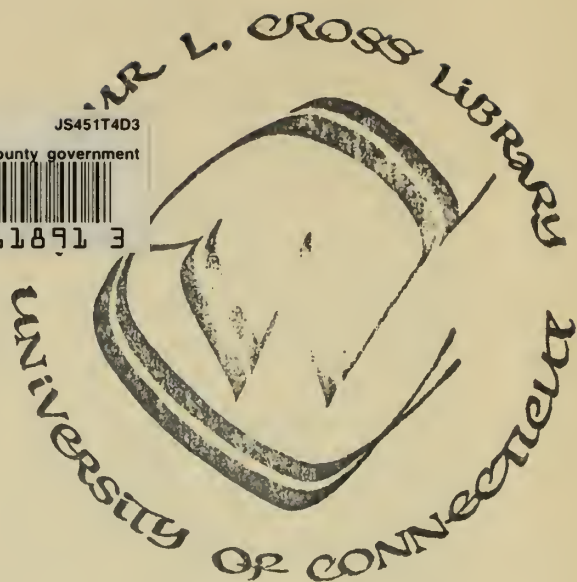
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Municipal and county government



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THE CONSTITUTION OF TEXAS

(With its ~~140~~ Patches)

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Municipal and County Government

J. WILLIAM DAVIS and WILLIAM E. ODEN
Texas Technological College

ARNOLD FOUNDATION MONOGRAPHS
Southern Methodist University Dallas, Texas

Arnold Foundation Monographs
VIII

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Municipal and County Government

*... the third of a series of monographs
analyzing respectively the major pro-
visions of the Constitution of Texas
and published in the public interest.*

Edited by
JOHN M. CLAUNCH

ARNOLD FOUNDATION MONOGRAPHS VIII

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. . . Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.

—The Declaration of Independence

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Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant—too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it and labored with it. It deserved well of its country. It was very like the present but without the experience of the present. . . . I am certainly not an advocate of frequent and untried changes in laws and constitutions. . . . But I know also that laws and institutions must go hand in hand with the progress of the human mind.

—Thomas Jefferson

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Foreword

The 55th Legislature of Texas passed House Concurrent Resolution No. 13, providing for a study of the Texas Constitution which has been in effect since February 15, 1876, and which has been amended some 144 times. According to the resolution, the Texas Legislative Council is to undertake a study of each section of the Constitution to determine its historical and present purpose, any interpretation given it by the courts, its role in shaping Texas state government, the presence or absence of its counterpart in the constitutions of other states, and to determine generally what lessons are to be gained from other recent state constitutional revisions.

The Legislature suggested the desirability of public and private institutions of higher education assisting in the basic research which must precede any comprehensive revision of the constitution, and The Arnold Foundation at Southern Methodist University has been pleased to invite political science teachers from several Texas colleges and universities to prepare research papers on some of the important provisions of the constitution. These research papers will be published as Arnold Foundation Monographs, in which form they will serve as valuable aids to the members of a commission or convention engaged in revising the Constitution of Texas.

This is a fragmentary study of two articles of the Texas Constitution—those nominally dealing with local government. Professors J. William Davis and William E. Oden are professors of government at Texas Technological College. Professor Davis is a member of the *Citizens Advisory Committee on Constitutional Revision*, and volunteered to undertake this study as an experiment in pursuance of the legislative resolution.

In Part One of this monograph, Professor Davis has examined, section by section, Article XI (Municipal Corporations) of the Texas Constitution. He has attempted to identify its inadequacies and has suggested possible revisions to overcome them.

In Part Two of this monograph, Professor Oden has examined, section by section, Article IX (Counties) of the Texas Constitution. He has attempted to identify the inadequacies of this article and has suggested possible revisions.

This study leads inexorably to the conclusion that in a revision of the Texas Constitution there should be an article on Local Government. Emphasis should be given to home rule and flexibility, and subjects that could best be left to legislation should not be included in the constitution.

Part One

Municipal Government

CHAPTER I

INTRODUCTION

The activities, services and functions of government on all levels have been steadily increasing in recent years. Although more comment is heard on the expanding role of the national government, the growth of state and local expenditures for governmental services is a clear index of the continuing expansion on those levels.¹

It is a truism that state-local relations have not kept pace with their increased responsibilities. A tremendous volume of literature is being published, and extensive discussion and research is occurring, seeking better solutions to the increasing complex problems of state-local relationships.²

State constitutions must furnish the theme—but not the details—of state-local relationships. Since local governments are creatures of the state,³ the state is superior to the local units, both legally and financially. Thus, a primary responsibility for proper state-local relations rests with the state constitution. Legislative statutes and charter provisions complete the legal basis for state-local relations.⁴

There are four principal areas in which a state constitution shapes the pattern of municipal governments. They are the areas of: (1) incorporation (charters), (2) special and local laws, (3) personnel, and (4) finance. In addition to the constitutional provisions themselves, the tone of state-municipal relations will usually be set by the state legislature in its general or special laws relating to local governments, and by the courts in their interpretation of constitutional, statutory and charter provisions.

The Texas Constitution contains provisions governing the four

¹ *State-Local Relations*. Report of the Committee on State-Local Relations, (Council of State Governments, 1946), p. 1.

² See for example the publications of the National Municipal League and the Council of State Governments. Many of these problems were high-lighted at the recent *National Conference on Government*, sponsored by the National Municipal League, Nov. 13-16, 1960, Phoenix, Arizona.

³ *State-Local Relations*. Report of the Committee on State-Local Relations. Council of State Governments, 1946), p. 1.

⁴ *Ibid.* p. 142.

broad areas affecting municipal governments, as well as a smattering of other provisions which directly or indirectly affect municipalities. The principal reference to the subject of municipal incorporation is found in Article XI of the Constitution, entitled "Municipal Corporations." After several amendments have been added to the original document of 1876, the Article now provides optional home rule for cities above 5,000 population, and for general law charters for other cities, towns and villages. (For details see discussion of Article XI, *Infra*).

The Texas Constitution also embraces the theory of limiting the state legislature to general laws relating to cities, and restricting its power to pass special and local laws. (For details see discussion of special and local laws, *Infra*). The theory is not always observed in practice, and much legislation under the guise of classification has been enacted which, in spirit if not in law, violates the limitation against special legislation.⁵

The Constitution of Texas also contains scattered references to municipal personnel. (See discussion of municipal personnel, *Infra*). Reflecting a fear of abuse of power most of the provisions have been negative in character. Thus, as conditions have changed there has been a need for frequent constitutional amendment.

The fourth broad area of state-municipal relations—finance—is also included in the Constitution of Texas. In accord with the general theme of the Constitution, the references are chiefly in the nature of limitations. Some limits have been so broad and sweeping as to require frequent constitutional amendment as changing conditions have necessitated legislation that might not have been anticipated by the framers in 1876. (See discussion of finance, *Infra*).

In order to follow the prescribed pattern of section by section analysis of the Texas Constitution, this study includes: first, an analysis of Article XI, which contains the provisions for incorporation of cities; second, an analysis of Article III, Section 56, and other provisions relating to special and local laws; third,

⁵ Benton, W. E., "Population Brackets as a Method of Classification", *Southwestern Social Science Quarterly*, Sept., 1950, pp. 117-135.

a study of miscellaneous provisions dealing primarily with municipal personnel; and fourth, a brief commentary on municipal finance.

CHAPTER II

MUNICIPAL CORPORATIONS

ARTICLE XI

Introduction. Texas is somewhat unique in having an article in its constitution entitled "Municipal Corporations." The obvious interpretation of such a title would be that it referred to city governments. The opening section, however, shows that its meaning involves a broader interpretation and that it includes counties as well.

A Municipal Corporation has been variously defined as follows:

A body politic created by organizing the inhabitants of a prescribed area, under the authority of the legislature, into a corporation with all the usual attributes of a corporate entity, but endowed with a public character by virtue of having been invested by the legislature with subordinate legislative powers to administer local and internal affairs of the community, as well as creating it a branch of the state government to assist in the civil government of the state. (37 *American Jurisprudence* 617-619.)

The body politic and corporate constituted by the incorporation of the inhabitants of a definite locality for the purposes of local government—the organization of a certain geographical district under authority of law. (30A *Texas Jurisprudence* 23.)

A Municipal Corporation may be described in outline to be a legal institution, or body politic and corporate, established by public law, or sovereign power, evidenced by a charter, with defined limits and a population, a corporate name, and a seal, though a seal is not essential; and perpetual succession primarily to regulate the local or internal affairs of the territory or district incorporated by officers selected by the corporation, and secondarily, to share in the civil government of the state in the particular locality. (McQuillin, *The Law of Municipal Corporations*, 2nd. Ed., Vol. 1, p. 365.)

A municipal corporation is a legal institution formed by a charter from sovereign power, erecting a populous community of a prescribed area into a body politic and corporate with corporate name and continuous succession and for the purpose, and with the authority, of subordinate self-government and improvement and local administration of affairs of state. (62 *Corpus Juris Secundum* 61.)

Most of the commentaries, after defining municipal corporation in such a way as to include counties as well as cities, continue their discussion as if only cities were involved. *American Jurisprudence* indicates that the term should apply only to cities and not to counties or other sub-divisions of the state, which in reality, should be known as "quasicorporations." (37 *American Jurisprudence* 623-24.)

Article XI of the Texas Constitution refers to counties, cities, towns, villages, municipal corporations, school districts, and municipalities, without making clear the distinction between them. As used in Article XI the term *Municipal Corporation* obviously includes counties as well as cities. Article IX, however, is entitled *Counties*. Neither article makes full provision for the organization, powers and limitations of local governments.

Much of the material relating to cities and counties appears in other parts of the Constitution. Article XI is not a self-contained unit on local government but is something of a smattering of "odds and ends" that must have seemed necessary at the time. It is somewhat difficult to find the relationship between some of the provisions of Article XI and other pertinent provisions of the Constitution. Some relationships are subtle and almost hidden while others appear contradictory.

The section by section analysis which follows demonstrates the inconclusiveness of Article XI of the Texas Constitution and the difficult problem of interpreting it as a constitutional basis for local government in the state.

ARTICLE XI, SECTION 1

The several counties of this state are hereby recognized as legal subdivisions of the state.

History. Article XI, Section 1, was originally adopted in the Constitution of 1876. The reason for this statement in the Constitution is uncertain. It probably grew out of the history of the state and the background of Spanish-Mexican law and institutions to which were added Anglo-American ideas and customs.⁶ Under the Spanish-Mexican system no subdivisions such as the English counties existed. Instead, the country was organized

⁶ See S. V. Conner, "The Evolution of County Government in the Republic of Texas," *The Southwestern Historical Quarterly*, LV (October, 1951), pp. 163-200.

into "municipalities" and each municipality was governed by an *ayuntamiento*, composed of one or more *alcaldes* and *syndicos*, and a board of *regidores* elected indirectly by the people.⁷ The municipality included a large area with a town as its center or capital.⁸

The Constitution of 1836 authorized the legislature to create counties and that term has been continued in Texas constitutions and government. The Spanish-Mexican term "municipality" continued in use, however, as did the terms "precinct" and "jurisdiction."⁹ Local governments did not receive much attention in early constitutions and the Constitution of 1876 is the first to contain an article on Municipal Corporations. Since the meaning of that term was uncertain, it is possible that Section 1 was inserted to make it clear that counties were included and to define a county as a legal subdivision of the state.

There have been no amendments to this section.

Comparable provisions in other constitutions. Beginning with the Constitution of 1836, all of the constitutions of Texas have referred to counties, and the assumption has been that they were legal subdivisions of the state, but this is the first statement of this nature in the form of a definition.

The statement of Section 1 is a customary provision of law in other states, but is ordinarily not found in their constitutions. Most state constitutions assume that the county is a legal subdivision of the state, but few have a specific statement such as the Texas Constitution. The Constitutions of Arizona (XII, 1), California (XI, 1), Georgia (XI, 1), and Michigan (VIII, 1), have somewhat similar statements.

There is no article on Municipal Corporations in the Model State Constitution and the article on Local Governments uses the term county but has no such statement as that of Article XI, Section 1, of the Texas Constitution.

Interpretations. Article XI, Section 1, indicates that a county is a municipal corporation (along with cities and towns) and

⁷ J. E. Ericson, *An Inquiry into the Sources of the Texas Constitution*, unpublished Doctor's Dissertation, Texas Technological College, Lubbock, Texas, 1957, p. 21.

⁸ For a good history of early local government see *City of Victoria v. Victoria County*, 94 S. W. 368 (1906).

⁹ *Ibid.*

thus each county is a "body corporate and politic." A county, as such, has the power to institute suits and to defend against those suits brought against it.¹⁰ In Texas the inherent power to create municipal corporations is vested in the legislature.¹¹ The inhabitants of a given territory have no inherent power to create a municipal corporation,¹² and the exercise of the corporate privilege depends upon compliance with the provisions of the law authorizing them.¹³

Conclusions and Recommendations. Article XI, Section 1, is apparently superfluous. It neither adds nor changes anything. It is in the form of a definition where no definition is needed.

It is recommended that this section be deleted, or, if a definition of a county is needed, that it be placed in the article or section relating to counties.

ARTICLE XI, SECTION 2

The construction of jails, court-houses and bridges and the establishment of county poor houses and farms, and the laying out, construction and repairing of county roads shall be provided for by general laws.

History. The provisions of Article XI, Section 2, were included in their present form in the Constitution of 1876. Earlier constitutions and statutes had contained references to some of those subjects, but a special reason seems to have caused the present constitutional arrangement.

The Constitutional Convention of 1875 sought to prohibit local and special legislation by adopting Article III, Section 56.¹⁴ That section contains a detailed list of subjects on which the legislature is forbidden to pass any local or special law except as otherwise provided in the Constitution. The list includes "regulating the affairs of counties," "laying out, opening, altering or maintaining roads," and "bridges" and all the subjects contained in Section 2 could easily be interpreted as within this prohibition.

¹⁰ *Vernon's Annotated Constitution of the State of Texas* (Kansas City, Missouri: Vernon Law Book Company, 1955), Vol. 2, p. 631.

¹¹ *Blessing v. Galveston*, 42 Tex. 641 (1875).

¹² *State ex rel Hoya v. Dunson*, 9 S. W. 103 (1888).

¹³ *State ex rel Wilke v. Stein*, 26 S. W. 2d 182, (1929).

SECTION 2

¹⁴ *Vernon's Texas Constitution*, Vol. 2, p. 631.

Section 2 of Article XI is obviously supplemental to Article III, Section 56, stating positively that general laws shall cover these activities, rather than relying on the negative provisions of Article III, Section 56.¹⁵

There have been no amendments to Article XI, Section 2.

Comparable Provisions in Other Constitutions. Prior to the Constitution of 1876, such subjects as those contained in Article XI, Section 2, were usually dealt with through special laws enacted by the legislature. The Constitutions of 1866¹⁶ and 1869¹⁷ had contained references to "poor houses," and the Constitution of 1866 had a provision relating to the roads in the county,¹⁸ but no section similar to this was found in earlier Texas Constitutions.

The constitutions of most states permit local governments to build public buildings and roads but few detail the power as in the Texas Constitution.¹⁹ Several states provide for the power to build county roads²⁰ but in most state constitutions such authorization is recognized as a general power of the legislature, or is included in the general powers of the county without specifics. The Model State Constitution authorizes counties to provide for their general needs, obviously including the subjects of Article XI, Section 2.

Interpretations. This section expressly requires the enactment of a general law to carry its mandates into effect.²¹ It is supplementary to the provision of Article III, Section 56. It is cumulative of Article VIII, Section 9, and does not prohibit what that section authorizes.²² The general effect of Section 2 is to require county governments to care for their own public works.

Conclusions and Recommendations. Article XI, Section 2, is another example of duplication and confusion in the Texas Constitution. Other references to the subjects contained in this

¹⁵ *Ibid.*

¹⁶ *Constitution of 1866*, Article IV, Section 17.

¹⁷ *Constitution of 1869*, Article XII, Section 26.

¹⁸ See H. P. N. Gammel, *The Laws of Texas, 1822-1897* (Austin, Texas: The Gammel Book Company, 1898), Vol. XI, pp. 868-69.

¹⁹ Only Arkansas mentions specifically, jails and court houses.

²⁰ Arkansas, Georgia, Kentucky, Mississippi, Michigan, Minnesota, New Mexico, North Carolina, New Jersey, New York, and West Virginia.

²¹ *Mitchell County v. City National Bank*, 43 S. W. 880 (1898).

²² *Smith v. Grayson County*, 44 S. W. 921 (1897).

section are found in Article XVI, Section 8 (poor houses), Article XVI, Section 24 (roads or bridges), Article III, Section 52c (roads), Article III, Section 52d (roads and bridges in Harris County), Article VIII, Section 9 (roads and bridges), Article III, Section 56 (roads, etc.). Such a scattering of references is confusing and unnecessary. The authority to pass general laws on the needs of the counties should be provided in the article on legislative power. Consideration might also be given to an element of county home rule in this field of power.

Article XI, Section 2, is of no utility and should be deleted.

ARTICLE XI, SECTION 3

No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.

History. Article XI, Section 3, was originally adopted in the Constitution of 1876. The section was inserted in the Constitution as a reaction to Reconstruction practices in financing railroads.²³ Previous Texas constitutions had contained no limitation on the power of a municipality to subscribe for stock in railroad construction. Realizing that a transportation system was important for the growth and development of Texas, the people of the state had become exceedingly generous with both donations of land and private funds to aid in the development of railroads. As some of the earliest railroad companies chartered in Texas had failed because of lack of funds, pressures had grown to provide for public funds for the construction of railroads in the state. Texas followed the pattern of many other states in providing for the sale of public bonds to secure funds for railway construction. The first act providing for the use of city and county bonds for railroad construction was an act chartering the San Antonio and Mexican Gulf Railroad, passed, September 5, 1850.²⁴ This act allowed any county or incorporated town along the proposed route, upon a two-thirds majority vote, to subscribe

²³ *Vernon's Texas Constitution*, Vol. 2, p. 634.

²⁴ Gammel, *The Laws of Texas*, p. 814.

to the capital stock of the company for not more than \$50,000. County bonds were to be issued and a special tax was voted to pay interest and create a sinking fund. The practice of giving aid or credit to railroads was common in Texas from 1850 to 1875. In 1871, a general law was passed providing that any county, city, or town could donate or subscribe bonds to aid in railway construction.²⁵

Since the state Reconstruction government had control over local units of government, these measures were used as a means of enriching individuals and corporations who were often more interested in easy money than in building railroads. Furthermore, the railroads which had already been constructed were charging an outrageous rate and were practicing discrimination in such a way that a violent reaction against the railroads resulted in the state.²⁶ The granting of public aid to the railroads was condemned by the Democratic Party of the state, and when it came into power in 1874 an act was passed repealing the law of 1871.²⁷

One of the objectives in the Constitutional Convention of 1875 was to return control over local government to the local citizens. Hence, in the Constitution of 1876, Section 3 of Article XI was inserted to prohibit the legislature from authorizing city or county governments to issue any form of financial aid to private enterprise. The last section of the above provision is in accord with the basic American principle that vested rights should not be disturbed or violated even though obnoxious.²⁸

There have been no amendments to Section 3 of Article XI.

Comparable Provisions in Other Constitutions. Previous Texas Constitutions did not contain a provision of this type. Constitutions of other states which were examined had no such provision in an article on Municipal Corporations, although it is not uncommon to find the idea expressed in some other part of the constitution in a general manner. The present Texas Constitution, in Article III, Section 52, prohibits the legislature from

²⁵ A. P. Cagle, *Fundamentals of the Texas Constitution* (Waco, Texas: Baylor University Press, 1957), p. 187.

²⁶ *Vernon's Texas Constitution*, Vol. 2, p. 634.

²⁷ *Ibid.*

²⁸ Cagle, *op. cit.*

authorizing a local government to lend its credit or grant money to any individual or corporation.

Article VII, Section 701, of the Model State Constitution provides:

The credit of the state or any civil division thereof shall not in any manner, directly or indirectly, be given or lent to or used in aid of any individual, association or private corporation.

Article VII, Section 705, of the Model State Constitution provides:

No tax shall be levied or appropriation of public money or property be made, either directly or indirectly, except for public purposes, and no money or property shall ever be appropriated, applied, donated, or used directly or indirectly, for any sect, church, denomination, or sectarian institution. No public money or property shall be appropriated for a charitable, industrial, educational, or benevolent purpose except to a department, office, agency, or civil division of the state.

In the section on municipal government, the Model State Constitution confers upon cities certain powers which are not a loan of the city's credit if applied for a city purpose. Section 804 of the Model State Constitution says that:

A city shall have the power, when not inconsistent with the general law, to provide for slum clearance, the rehabilitation of blighted areas, and safe and sanitary housing for families of low income, and for recreational and other facilities incidental or appurtenant thereto; and gifts of money or property or loan of money or credit for such purposes shall be deemed to be for a city purpose and not a loan of credit of the city for a private purpose.

Interpretations. Article XI, Section 3, of the Texas Constitution has been interpreted by the courts of Texas to cover several fields of municipal activity. Among those subjects included are boards, commissioners' courts, contracts, liability for death, donations and contributions, and others. This section of the Constitution has generally been interpreted to prohibit any benefits to individuals, corporations, or associations, which are sought at public expense. For example, a contract whereby a city agrees with several persons to transfer its water works to a corporation which they intend to organize on certain terms which do not fix

the capital or power of the corporation, is, in effect, a loan by the city of its credit to the proposed corporation, and is thus invalid.²⁹ On the other hand, it has been held that a charter provision and ordinance establishing a board of city development did not violate the constitutional provision prohibiting aid of private associations.³⁰ Similarly, municipal corporations are not precluded from subscribing to employers insurance associations. When incorporated cities and towns are exercising functions of private corporations they come within the workman's compensation law.³¹

Article III, Section 52, of the Texas Constitution includes a statement similar to that of Article XI, Section 3.

The legislature shall have no power to authorize any county, city, town, or other political corporation or subdivision of the state to lend its credit or to grant public money or things of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association, or company. . . .

This section continues by providing for certain exceptions which may be approved and authorized by the legislature and adopted by the voters of the county or political subdivision. Here is another illustration of duplication in the Texas Constitution. The two provisions are worded somewhat differently, but the obvious intent of both is the same; that is, to prevent any public money or credit from being used to the advantage of any individual or association. Several interpretations of this section have been made by the Texas courts. The essence of all of the interpretations has consistently been to preclude benefits to individuals, corporations, or associations at public expense.

Conclusions and Recommendations. Apparently there is a need in a state constitution for a provision such as the one included in Article XI, Section 3. It has become fairly well established in Texas and in the nation as a whole, that public money or credit should not be granted in aid of any individual or group. There seems to be no need for the duplicate provisions in the Texas

²⁹ *Vernon's Texas Constitution*, Vol. 2, p. 636, citing *City of Cleburne v. Brown* 11 S.W. 404.

³⁰ *Ibid.*, p. 635.

³¹ *Ibid.*

Constitution. Article XI, Section 3, seems to state the principle adequately. Article III, Section 52, seems to be unnecessary, except for the deviations that are allowed from the general rule. These are not exceptions to the general principle, however, but are illustrations of what might legitimately be done by political subdivisions of the state. Section 52 of Article III was adopted in 1904 and, although it is not the subject of this particular study, it is a good illustration of poor constitution writing, containing one lengthy, rambling sentence.

It seems that a statement such as that appearing in Article XI, Section 3, should be made in the Constitution. However, a similar statement would need to apply to the state, or to counties, or other political or civil subdivisions of the state. It would therefore seem to be appropriate to have one general statement such as that contained in Article VII, Section 701, of the Model State Constitution which would apply to the state and all of its subdivisions. It is useless to repeat the same statement for each level of government. A general statement applying to all levels of government should suffice.

ARTICLE XI, SECTION 4

Cities and towns having a population of five thousand or less may be chartered alone by general law. They may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year which shall exceed one and one-half per cent of the taxable property of such city; and all taxes shall be collectible only in current money, and all licenses and occupation taxes levied, and all fines, forfeitures and penalties accruing to said cities and towns shall be collectible only in current money.

History. Article XI, Section 4, was originally adopted in the Constitution of 1876, but was amended in 1909 and in 1920.

Little attention was given to local government in the early Texas Constitutions and there were no constitutional provisions directly relating to incorporation. Cities were first incorporated by special law. The first general law providing for incorporation of municipalities was passed by the legislature in 1855,³² and few communities took advantage of this act.

³² Gammel, *The Laws of Texas*, pp. 941-46.

During the Reconstruction Period, control of local government was greatly centralized in the state capital.³³ The legislature, on June 28, 1870, passed a law providing that the governor should appoint a mayor and aldermen of each incorporated municipality, and that the aldermen, in turn, should select all additional municipal officials.³⁴ This statute was repealed in 1873, but the memory of the initial act remained as one of the driving forces of the Constitutional Convention of 1875 to insure more local control of local government.³⁵ To prevent the reoccurrence of legislative action centralizing local government, the Convention of 1875 provided that cities and towns having a population of ten thousand or less could be chartered only by general law. Cities of more than ten thousand population might continue to be incorporated by special law.³⁶

Article XI, Section 4, was presented to the Convention and read initially by George Flournay, Chairman of the Committee on Municipal Corporations, on November 16, 1875.³⁷ It reads as follows:

Section 4. Cities and towns having a population of ten thousand inhabitants, or less, may be chartered alone by general law; they may levy, assess and collect an annual tax to defray the current expense of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collectible only in current money.³⁸

The subject on municipal corporations was considered again on November 23, 1875. At that time, a Mr. Crawford offered the following amendment:

Add to Section 4, and all license and occupation tax levied, and all fines, forfeitures, penalties and other dues accruing to cities and towns shall be collectible only in current money.³⁹

The amendment was adopted and on motion of Mr. Nunn, the question was ordered and the article was engrossed by a vote of 36 yeas and 21 nays.⁴⁰

³³ Ericson, *Sources*, p. 167.

³⁴ Gammel, *The Laws of Texas*, Vol. VI, pp. 191-92.

³⁵ Ericson, *Sources*, p. 167.

³⁶ *Ibid.*

³⁷ *Journal of the Constitutional Convention of the State of Texas, 1875* (Austin, Texas), p. 694.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 790.

⁴⁰ *Ibid.*, pp. 791-92.

There have been two amendments added to Article XI, Section 4. The first, ratified in 1909, was proposed by large majorities of both the House of Representatives and the Senate, and was endorsed overwhelmingly by the voters on August 3, 1909.⁴¹ It was proclaimed September 24, 1909, as an amendment to the Constitution. The amendment read as follows:

Section 4. Cities and towns having a population of five thousand or less may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed for any one year one-fourth of one per cent and shall be collectible only in current money, and all licenses and occupation taxes levied and all fines, forfeitures, penalties and other dues accruing to cities shall be collectible only in current money.⁴²

There was only one change effected by this amendment. The population figure was lowered from ten thousand to five thousand inhabitants for purposes of obtaining a general law charter and the taxing power that accompanied such a charter. The punctuation and sentence structure of the original provision was slightly modified, but with no substantive change.

Little publicity was given to this amendment when it was proposed and submitted to the voters. A relatively small vote of 44,990 for and 19,222 against the amendment showed slight public concern.⁴³ An editorial in the *Dallas Morning News* of August 3, 1909, stated: "The proposed amendments to the Constitution that are to be voted on today are so clearly desirable that not the most caviling mind could invent even a pretext for opposition."⁴⁴ The Mayors' Association of Texas had urged the passage of the amendment, thus evidencing total support.⁴⁵ The substantial majority by which the amendment was ratified also indicated general approval.

The second amendment to Article XI, Section 4, was adopted in 1920. Senate Joint Resolution No. 12 was passed by a large

⁴¹ Seth Shepard McKay, *Seven Decades of the Texas Constitution* (Lubbock, Texas: Texas Technological College Press, 1942), p. 227.

⁴² *Vernon's Annotated Statutes of the State of Texas* (Kansas City, Missouri: Vernon's Law Book Company, 1927), Vol. L, p. 46.

⁴³ McKay, *Seven Decades*, p. 227.

⁴⁴ *Dallas Morning News*, August 3, 1909, p. 6, Col. 1.

⁴⁵ *Ibid.*, February 17, 1909, p. 2, Col. 1.

majority in the Senate and House of Representatives.⁴⁶ The proposed amendment was ratified by the voters on November 2, 1920, by a vote of 173,920 to 156,031.⁴⁷ The amendment, which is the present provision of Article XI, Section 4, is quoted at the beginning of this section.

The object of this amendment was to increase the tax potential of general law cities so as to meet increasing demands. The wording was changed so as to allow "such taxes as may be authorized by law," and the limit on the tax rate was increased from one-fourth of one per cent, to one and one-half per cent. Although little publicity was given to it in the press of the state, the amendment obviously had the endorsement and support of local officials.

Comparable Provisions in Other Constitutions. The provisions of Article XI, Section 4, of the Constitution of 1876 are not found in any previous Texas Constitution.⁴⁸

Some provision for general law charters appears in most state constitutions. There is one unique feature in the Texas Constitution that is not contained in any other present constitution examined—the provision that taxes and other fees are "collectible only in current money."

In three states, Delaware, Maine, and Virginia, non-home rule cities can be chartered by either general or special law. In other constitutions the requirement is that non-home rule cities are chartered by general law, as in Texas.⁴⁹

Most state constitutions also limit the taxing power of municipalities incorporated by general law in a manner similar to the Texas Constitution. The population requirements for general law charters and home rule charters are similar to those in most state constitutions.⁵⁰

The provisions of the Model State Constitution are somewhat similar to Article XI, Section 4, of the Texas Constitution, but

⁴⁶ The vote was 22 to 0 in the Senate and 96 to 13 in the House. *Journal of the House of Representatives of the 1919 Texas Legislature* (Austin, Texas: Von Beckman-Jones Company, 1919), p. 906.

⁴⁷ McKay, *Seven Decades*, p. 227.

⁴⁸ See Ericson, *Sources*, pp. 152-157.

⁴⁹ Thirty-eight state constitutions were examined on this subject.

⁵⁰ See Rodney L. Mott, *Home Rule for America's Cities* (Chicago: American Municipal Association, 1949), pp. 20-21.

are in a more general vein. The Model State Constitution states that provisions shall be made by general law for the incorporation of cities.⁵¹ It also confers the power "To levy, assess, and collect taxes, and to borrow money and issue bonds, and to levy and collect special assessments for benefits conferred," when not inconsistent with general law.⁵²

Interpretations. As is true throughout the interpretations of Article XI, some uncertainty exists because of the vagueness of the term "Municipal Corporation."⁵³ Although Section 4 does not use this term, it is somewhat affected by the interpretation of it. Article XI, Section 4, speaks of "cities and towns," and thus plainly relates to municipal governments. The Constitution nowhere distinguishes between "cities" and "towns," and the statutes pursuant to this subject further complicate it by including "villages" as a category. The words, "city," "town," and "village," are apparently used interchangeably, and without known distinction in the statutes.⁵⁴

Two subjects are considered separately in the interpretations.

1. *Incorporation.* The inhabitants of a given territory have no inherent power to create a city⁵⁵ or to determine its form of government.⁵⁶ These powers derive from the Constitution and the laws of the state. The Texas Constitution assumes that inherent power to create municipal corporations is vested in the legislature, and the courts of Texas have so held.⁵⁷

The Texas Constitution and the laws of the state have allowed at times for three types of charters: (1) special law, (2) general law, and (3) home rule. Prior to 1858, apparently only special law charters were issued. After the first general law for incorporation was passed, charters could still be granted by special law. The original provision of Article XI, Section 4, was a step toward

⁵¹ *Model State Constitution* (New York: National Municipal League—Committee on State Government, 1954), Article VIII, Section 800.

⁵² *Ibid.*, Article VIII, Section 804.

⁵³ See earlier discussion of this subject.

⁵⁴ See the discussion in *Texas Jurisprudence* (San Francisco: Bancroft-Whitney Company, 1954), Vol. XXX-A (Revised). Also see *Texas Digest* (St. Paul, Minnesota: West Publishing Company, 1957), Vol. 28-A. Most of this information is from these sources. Most of the case citations are taken from these publications, but are given separately for special reference.

⁵⁵ *State ex rel Hoya v. Dunson*, 9 S.W. 103 (1888).

⁵⁶ *Brown v. City of Galveston*, 75 S.W. 488 (1903).

⁵⁷ *Blessing v. City of Galveston*, 42 Texas 641 (1875).

elimination of special legislative charters, but the amendment of 1909 lowered the population figure so that special law charters continued for larger cities. Even after the home rule amendment was adopted in 1912, special laws by the legislature granted or changed charters.⁵⁸ It was not until 1920 that a court decision held such action unconstitutional⁵⁹ and another case in 1929 emphasized that the power to grant or change a city charter by special law was lost.⁶⁰

Presently, municipal governments may be classified as "general-law cities" (Article XI, Section 4), or as "home rule cities" (Article XI, Section 5). Cities under five thousand population must operate under general law and cities over that figure may adopt a home rule charter.⁶¹

General law cities have no power to amend their charters since power belongs exclusively to the legislature.⁶² The legislature, however, may not change such charters by special or local law, but only by general law.⁶³ On the other hand, it has been held that the legislature by special act, may repeal the charter of a city and annex it to a city of over ten thousand population.⁶⁴

2. *Taxation.* On the subject of taxation by general law cities, Article XI, Section 4, fixes the maximum rate to be collected. It has been held that this provision refers to the *ad valorem* tax and was not intended to deny power to collect other types of taxes.⁶⁵ However, general law cities may not levy taxes on property within their limits except as expressly delegated by the Construction or by statute.⁶⁶ Any constitutionally authorized tax is permitted so long as the rate shall not exceed the constitutional limit.⁶⁷

Conclusions and Recommendations. Municipal corporations are creatures of the state and derive all their powers from the Con-

⁵⁸ Stuart Alexander MacCorkle and Dick Smith, *Texas Government* (New York: McGraw-Hill, 1956), pp. 359-60.

⁵⁹ *State v. Vincent*, 217 S.W. 402 (1920).

⁶⁰ *Ex Parte Norton*, 21 S.W. 2d, 663 (1929).

⁶¹ MacCorkle and Smith, *Texas Government*, p. 630. In some few instances there may still be special charters.

⁶² *Munday v. First State Bank*, 66 S.W. 2d. 775 (1933).

⁶³ *Tolle v. City of New Braunfels*, 154 S.W. 345 (1913).

⁶⁴ *City of Oak Cliff v. State*, 77 S.W. 24 (1903).

⁶⁵ *Perry v. City of Rockdale*, 62 Texas 451 (1884).

⁶⁶ *Vance v. Town of Pleasanton*, 261 S.W. 457 (1924).

⁶⁷ *Boss v. City of Clifton*, 261 S.W. 795 (1924).

stitution and laws of the state. Taken together, Article XI, Sections 4 and 5, show the classification of Texas cities. Those under five thousand population must operate under general laws while those over five thousand may adopt a home rule charter.

A provision on general law charters similar to that contained in Article XI, Section 4, seems to be necessary. It also seems that some limit on the taxing power of municipalities is fairly prevalent. The only question seems to be whether or not a constitution should contain the population figure of general law cities, and the specific tax limitation. Experience with the Texas Constitution has demonstrated that such specifics have required amendment.

Possibly the principle of the Model State Constitution should be followed: a general grant of power to the legislature to provide a general law for incorporation, and to fix limitations on taxation. This would allow for change, as demanded, without constitutional amendment.

Another alternative would be to direct the legislature to provide several forms of government by general law, and to allow general law cities to choose among them. Local self-government could thus be encouraged within limits.

A third possibility is to allow a community of any size to adopt a home rule charter. There is merit in the idea that every city has its special problems and could best frame its own charter to meet these problems. Self-government would be as nearly complete as possible, always within the framework of the state law.

Certainly the Texas statutes on the subject of municipal government need revision. The categories of "cities," "towns," and "villages" should be abandoned and a standard terminology created for municipal government.

The portion of Article XI, Section 4, pertaining to taxation should be revised. The same tax problems do not apply to all cities alike, and flexibility should be provided—perhaps again by a general grant of power to the legislature. Here is another field in which local self-government and responsibility might be encouraged by permitting greater discretion to be exercised by each community. Since the state does not assume

responsibility for the fiscal soundness of a community, perhaps it should leave each city to determine its own tax potential.

ARTICLE XI, SECTION 5

Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the state, or of the general laws enacted by the legislature of this state; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years.

History. Article XI, Section 5, as it now reads, was adopted in 1912 as a constitutional amendment. It is known as the Home Rule Amendment, and for the first time allowed Texas cities of five thousand or more population to make their own charters and choose their own form of government. Prior to its adoption, Article XI, Section 5, provided for chartering of cities having more than ten thousand inhabitants by special act of the legislature.

The movement for home rule grew out of long dissatisfaction with incorporation by special acts of the legislature. Prior to 1836, there were no incorporated cities in Texas.⁶⁸ With the Constitution of that year the Spanish and Mexican municipalities became counties.⁶⁹ Representatives of towns appeared before the legislature to request municipal charters and these were issued by special act of the congress, and later by the state legislature.⁷⁰

⁶⁸ *An Introduction to Municipal Incorporation and Organization in Texas* (Austin, Texas: The Bureau of Municipal Research, University of Texas, 1945), p. 5.

⁶⁹ *Ibid.* See also the confusion in terminology resulting from the Spanish background and the use of the term "municipal corporation" as discussed in Article XI, Section 1.

⁷⁰ Frank M. Stewart and Joseph L. Clark, *The Constitution and the Government of Texas* (Boston: Heath and Company, 1949), p. 201.

Until 1858, these special charters were the only method of incorporation. In that year, the state legislature passed a general law for the incorporation of towns of three hundred "free white citizens," or cities of fifteen hundred inhabitants.⁷¹ This act set up the procedure for some general law incorporation. Fifteen years later, the law was amended to lower the population requirement to two hundred.⁷² Thus, from 1858 to 1874, Texas cities were incorporated either by general law or by special act. In 1874 the legislature provided for a limited type of home rule for all incorporated cities. This law provided that "whenever in the judgment of the Board of Aldermen of any incorporated town or city, it becomes necessary or desirable to amend the charter of said town or city, the said Board of Aldermen shall prepare suitable amendments to said charters, and submit said amendments to vote of the qualified electors in said town or city. . . ."⁷³

Although this act of 1874 was a step in the direction of home rule, the delegates to the Convention of 1875 ignored the principle and went back to general and special act charters with no provision for home rule.

In 1881, the legislature passed an act similar to the act of 1874 giving incorporated towns and villages the right to amend their charters.⁷⁴ The act was almost ignored and it was not until the Amendment of 1912 that home rule became a reality in Texas.

The trend for a number of years was toward home rule and away from charters by special law. The general law provision of Article XI, Section 4, showed the desire to remove charters from the field of special legislation in 1875. After the amendment to that section in 1909, the larger cities of the state were again under special law. Dissatisfaction with special law charters, the growth of cities in Texas, and the national trend toward home rule probably led to the adoption of the home rule amendment in 1912.⁷⁵

⁷¹ Gammel, *The Laws of Texas*, Vol. IV, p. 550.

⁷² *Ibid.*, Vol. VII, p. 550.

⁷³ *Ibid.*, Vol. VIII, p. 142.

⁷⁴ *Ibid.*, Vol. IX, p. 175.

⁷⁵ See John P. Keith, *City and County Home Rule in Texas* (Austin, Texas: Institute of Public Affairs, 1951), p. 23.

Two amendments have affected the original provision of Article XI, Section 5. The first, adopted in 1909, was an amendment to Section 4, lowering the population requirement for general law cities to five thousand inhabitants or less, thus lowering the requirements for special act incorporation from ten thousand to five thousand.

The significant amendment to Section 5 was the home rule amendment adopted in 1912, which was followed by an enabling act in 1913, making the amendment effective.

Comparable Provisions in Other Constitutions. The provisions of Article XI, Section 5, are not found in any previous Texas Constitution. Incorporation of cities was generally omitted in earlier constitutions, and no home rule provision had previously been included in a Texas constitution.

At least twenty-five states have some form of constitutional provision for home rule,⁷⁶ although the provisions differ widely. Two states make only one city each eligible.⁷⁷ At least nine states permit "any city or town" to qualify for home rule.⁷⁸ Other states set population limits which range from two thousand in Colorado to fifty thousand in Virginia. In most states, as in Texas, the adoption or amendment of municipal charters requires no approval but that of the voters. Four states, however, require the approval of the governor; three of the legislature; and one of the attorney general.

Constitutional home rule provisions may be said to be of three types. The first is permissive, as in Pennsylvania, where the initiation of home rule is at the discretion of the legislature. The second is mandatory, illustrated by Minnesota where the home rule clause directs the legislature to pass necessary statutes. The third is self-executing as in Oklahoma, where the constitution details the procedure for amending or adopting charters without the necessity of a legislative act.⁷⁹

The Model State Constitution provides that any city may

⁷⁶ See Rodney L. Mott, *Home Rule for America's Cities* (Chicago: American Municipal Association, 1949).

⁷⁷ Baton Rouge, Louisiana and Baltimore, Maryland.

⁷⁸ Michigan, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon, Utah, and Wisconsin.

⁷⁹ Keith, *Home Rule in Texas*, p. 37.

adopt or amend a charter for its own government.⁸⁰ This constitution contains a description of the method of framing a charter, and also lists powers of home rule cities. The Model State Constitution obviously encourages home rule and gives much latitude in the form of government and the powers to be exercised by a city.

Interpretations. Article XI, Section 5, endorsed the principle of home rule for cities, but did not provide a method for adopting such charters, nor did it enumerate the powers of a home rule city. There was disagreement as to whether the amendment was self-executing or required supplementary legislation, so the legislature in 1913, passed what is generally known as the Enabling Act.⁸¹ This act set forth the procedure for adopting and amending home rule charters, and listed the powers a city could exercise.⁸²

As to the general powers of home rule cities, one may find almost any interpretation desired if he looks at the right court case. There is, however, some agreement as to the purpose of the amendment—that is, to bestow upon home rule cities full power of local government, or the “power to do anything that the legislature could have authorized them to do.”⁸³ This would lead to the assumption that Texas cities enjoy a wide range of home rule powers.⁸⁴ But, on the other hand, one authority claims that in Texas, home rule means only the power to act in regard to those matters in which the legislature has not set a general standard.⁸⁵ It is almost impossible to make any general statement as to the powers of the home rule cities due to the seemingly conflicting opinions of the courts. For example, at different times, the courts have defined home rule powers as “all powers

⁸⁰ *Model State Constitution*, Article VIII, Section 801.

⁸¹ *Vernon's Annotated Revised Civil Statutes of the State of Texas* (Kansas City, Missouri: Vernon Law Book Company, 1953), Vol. IIA Article 1175.

⁸² The question of the necessity of the Enabling Act has not been completely decided by the courts. See *Texas Jurisprudence*, Vol. XXXA, pp. 44-45.

⁸³ *Forwood v. Taylor*, 147 Texas 161. Also see: *Houston v. Magnolia Park*, 276 S.W. 685; *Houston v. State*, 176 S.W. 3d 928; *Lubbock v. Magnolia Petroleum Co.*, 6 S.W. 2d 80; and *Wichita Falls v. Continental Oil Co.*, 1 S.W. 2d 596.

⁸⁴ Mott, *Home Rule*, p. 15.

⁸⁵ Frank M. Stewart, “What Municipal Home Rule Means Today: Texas After Twenty Years,” *National Municipal Review*, Vol. XXI, 1932, pp. 434-441, as quoted from Roscoe C. Martin, *Urban Local Government in Texas* (Austin, Texas: Bureau of Research in the Social Sciences No. 20, 1936), p. 29.

not prohibited by constitution or statute;”⁸⁶ again they have said the powers included only “such powers as are expressly granted.”⁸⁷ In *Yellow Cab Transit Co. v. Tuck*, the court said that the powers of a municipal corporation are derived directly from the constitution and the charter and not from the legislature;⁸⁸ yet a few years later it was said that cities have only “such power as is lawfully conferred by statute.”⁸⁹

The relation between the legislature and the municipality is not clear even in the field of charter adoption. While it is fairly well settled that a home rule city may adopt or amend its charter in any way it sees fit, the charter must not conflict with the constitution or laws of the state; therefore the legislature may limit this power simply by changing the general laws which are superior to municipal charters. If a generalization must be made pertaining to the powers of home rule cities, one might best quote the Texas Court of Civil Appeals which said “when the powers are doubtful, they are held not to exist.”⁹⁰

There are a few terms and phrases in Section 5 which might have varying interpretations. Some of these have been clarified to a certain extent by the court. For example, it has been held that the word tax in this section of the constitution refers only to *ad valorem* taxes.⁹¹ Also, the population requirement for home rule incorporation means that the city must have 5,000 inhabitants at the time of adoption;⁹² the legislature cannot force the use of the last federal census. And the constitutional requirement of a “majority vote of the qualified voters of said city” means merely a majority of those actually voting.⁹³

Conclusions and Recommendations. Certainly a provision for home rule for cities should be contained in a state constitution. If it is to be self-executing, it is probably necessary to describe the procedure for adopting a charter. On the other hand, a

⁸⁶ *Miller v. Uvalde County*, 20 S.W. 2d. 403.

⁸⁷ *Davis v. City of Taylor*, 67 S.W. 2d. 1036.

⁸⁸ *Yellow Cab Transit Co. v. Tuck*, 115 S.W. 2d. 455. Also *Community Natural Gas Co., v. Northern Texas Utilities Co.*, 13 S.W. 2d. 184.

⁸⁹ *City of El Paso v. State ex rel Town of Ascarate*, 209 S.W. 2d. 989.

⁹⁰ *City of Uvalde v. Uvalde Electric and Ice Co.*, 235 S.W. 2d. 625.

⁹¹ *Taylor v. Boyd*, 63 Texas 533.

⁹² *Houston v. Magnolia Park*, 276 S.W. 685.

⁹³ *Shaw v. Lindsley*, 195 S.W. 338.

mandate to the legislature to provide enabling legislation might allow flexibility and be susceptible to easier changes if necessary. In either case, it is recommended that cities of any size might incorporate under a home rule charter.

It is doubtful that an enumeration of powers is necessary. In both the Model State Constitution and the Texas Enabling Act enumeration of powers is followed by a general grant of power which is probably sufficient. It is suggested that a general statement that a city may possess all powers of local government not inconsistent with the constitution or laws of the state would be the most desirable constitutional provision.

ARTICLE XI, SECTION 6

Counties, cities, and towns are authorized in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed and collected separately from that levied, assessed and collected for current expenses of municipal government, and shall when levied specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds or other indebtedness for the payment of which such tax may have been levied.

History. Article XI, Section 6, was originally adopted in the Constitution of 1876.

Following the Civil War many cities, towns and counties had gone heavily in debt. Taxes were necessarily high and considerable concern was shown over mounting costs and indebtedness of local government.⁹⁴ In Texas, the Reconstruction government had been extravagant. Taxes and indebtedness were greatly increased on the local level as well as at the state level.⁹⁵ Section 6 of Article XI of the Constitution of 1876 seems to have been a reaction to Reconstruction extravagances in local expenditures and indebtedness.⁹⁶

Article VIII of the Constitution had already provided for

⁹⁴ *Nebraska University Studies on Constitutional Revision* (Lincoln, Nebraska: Nebraska University, 1925), Vol. 23, p. 122.

⁹⁵ Ericson, *Sources*, pp. 125-27.

⁹⁶ See William J. Shultz, "Limitations on Local Borrowing Powers," *The Annals of the Academy of Political and Social Science*, 1935, p. 118.

limits on municipal taxing power but separate arrangements were added in Article XI so as not to restrict the cities' ability to pay indebtedness. Section 6 was also to prevent local bondholders from going to the courts to force the payment of debts from taxation, leaving the municipality without funds with which to operate. It in effect states that the tax limitation on local governments does not apply to taxes necessary to satisfy former legal debts.⁹⁷

There have been no amendments to this section.

Comparable Provisions in Other Constitutions. No provision such as this is contained in earlier Texas Constitutions.

Most of the states have either constitutional or statutory provisions that no debt shall be incurred by a municipality unless provision is made for levying a tax sufficient to pay the interest and to provide a sinking fund.⁹⁸

The Model State Constitution grants local government the power to "levy, assess and collect taxes, and to borrow money and issue bonds and to levy and collect special assessments for benefits conferred."⁹⁹

Interpretations. The right to levy taxes to meet local indebtedness is provided in the Constitution and by statutes.¹⁰⁰ Article XI, Section 5, 6 and 7, all relate to this subject and several statutes have been passed elaborating on it. Section 6 specifically relates to "any indebtedness *heretofore* legally made," and is thus of little consequence at the present time except for an indebtedness that was existing at the time of the adoption of the Constitution of 1876.

Conclusions and Recommendations. There seems to be no need for Article XI, Section 6, as such. It is proper for a constitution to contain such a subject as this, but a general statement of indebtedness of local government should suffice, without repetition such as is found in the present constitution.

⁹⁷ *Vernon's Texas Constitution*, Vol. III, p. 674.

⁹⁸ Eugene McQuillin, *The Law of Municipal Corporations* (Chicago: Callaghan and Company, 1928), Vol. 4, p. 264. See also Clarence Callender, ed., "The State Constitution of the Future," *The Annals*, 1935, Vol. 181.

⁹⁹ *Model State Constitution*, Article VIII, Section 804.

¹⁰⁰ *Vernon's Annotated Revised Civil Statutes of the State of Texas*, Vol. LLA, p. 258.

ARTICLE XI, SECTION 7

All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of a two-thirds majority of the resident property taxpayers voting thereon at an election called for such purpose to levy and collect such tax for construction of sea walls, breakwaters, or sanitary purposes, as may now or may hereafter be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for.

History. Introductory Note. Article XI, Section 7, encompasses three separate subjects. For convenience, they may be referred to as (1) the "Gulf Coast" clause, (2) the "indebtedness" clause, and (3) the "eminent domain" clause. The section is poorly organized and poorly written, but evidently the third clause ("such works") relates to the first clause ("such works"), whereas the second clause ("any city or county") is general in its application.

The provisions of Article XI, Section 7, first appeared in the Constitution of 1876, but a forerunner of the indebtedness clause was contained in the Constitution of 1869.¹⁰¹

1) The Gulf Coast clause apparently was adopted to exempt that area from the restriction of Article III, Section 56, which prohibits the legislature from passing special legislation. At the time of the Convention, there had just been some devastating coastal floods which caused untold damage and suffering along the coastal area. An eloquent plea was made in the Convention of 1875 to relieve these coastal counties from taxes because of the damage from a recent coastal tornado. Speaking in favor of the relief, Mr. Russell of Harrison said:

Go to Wallisville and gaze upon homes devastated; go to Indianola and witness the awful misery and devastation there; go to Velasco and behold the destruction of property and homes; go to Bernard . . . Brazora . . . Saluria . . . Matagorda . . ., go where you will,

¹⁰¹ *Constitution of 1869*, Article XII, Section 23.

in all those counties all along our lovely coast and witness the desolation, destruction and suffering. . . .¹⁰²

In the light of such sentiment it is not difficult to see why some special provisions affecting the Gulf Coast were put into the Constitution even though remission of taxes was not included. It was, however, realized that areas bordering on the coast "face the unending problem of destruction through forces of nature,"¹⁰³ and a measure of relief was provided by this provision of Article XI, Section 7.

2) The indebtedness clauses apparently stemmed from the Reconstruction era when irresponsible officials saddled the state and local governments with staggering debts. At the Constitutional Convention of 1875, proposals were offered to limit indebtedness of counties and cities, but they were not carried.¹⁰⁴ In final form the Constitution set no specific limits on city or county indebtedness, but Article XI, Section 7, did require that any city or county which incurred a debt provide for a tax to pay the interest and create a sinking fund.

3) The eminent domain clause was obviously to allow condemnation for "such works" in the coastal areas. There was an effort in the Convention to include counties and cities in the eminent domain clause in Article I, Section 17, which related to the state only, but such efforts were defeated.¹⁰⁵ It is interesting to note that the opposition to the counties' use of eminent domain was based on a fear that county roads might mutilate plantations and fences. It was also feared that if cities exercised the powers, "whole blocks might be taken to open streets, and the homes of the people pulled down over their heads . . . as was done in New York City."¹⁰⁶ The Gulf Coast areas, however, were to be granted the power as a special exception.

Article XI, Section 7, was amended in 1932. Originally, the section read in part ". . . upon a vote of two-thirds of the taxpayers therein." Seldom did two-thirds of the taxpayers turn out

¹⁰² Seth Shepard McKay, *Debates in the Texas Constitutional Convention of 1875* (Austin, Texas: The University of Texas, 1930), pp. 250-53.

¹⁰³ *Vernon's Texas Constitution*, Vol. 2, p. 677.

¹⁰⁴ McKay, *Debates*, p. 310.

¹⁰⁵ *Ibid.*, p. 238.

¹⁰⁶ *Ibid.*

to vote so the provision was changed to read "two-thirds majority of the resident property taxpayers voting thereon." The amendment also changed the phrase "as may be authorized by law," to read, "as may now or may hereafter be authorized by law."

Comparable Provisions in Other Constitutions. None of the previous Texas Constitutions contained similar provisions except the Constitution of 1869, which contained the following indebtedness statement:

It shall be the duty of the legislature to provide by law, in all cases where State or County debt is created, adequate means for the payment of the current interest, and two per cent as a sinking fund for the redemption of the principal; and all such laws shall be irrevocable until principal and interest are fully paid.¹⁰⁷

None of the state constitutions examined contained special provisions relating to coastal counties or cities, although the Louisiana Constitution has articles relating solely to the city of New Orleans.

Many states have constitutional limitations on indebtedness of local governments. Some constitutions state the conditions under which indebtedness may be incurred. Others require the collection of an annual tax sufficient to pay interest and sinking fund. Several states require that the sinking fund be sufficient for the payment of the debt within a specified period. On the other hand, many state constitutions have little or no restriction on city or county indebtedness, apparently being willing to leave such regulation to the legislature or to the local government.

None of the state constitutions examined contained an eminent domain clause for counties and cities in any areas such as is found in Article XI, Section 7.

There is no provision in the Model State Constitution similar to the Gulf Coast clause. That constitution does contain an indebtedness clause authorizing local governments to issue bonds and borrow money within the debt limit imposed by law. It also contains a provision granting cities the right "to acquire, by condemnation or otherwise, property within its corporate limits" which is necessary for public improvements.¹⁰⁸

¹⁰⁷ *Constitution of 1869*, Article XII, Section 23.

¹⁰⁸ *Model State Constitution*, Article VIII.

Interpretations. 1) *The Gulf Coast clause.* The Texas Legislature and the Texas courts have practically nullified the Gulf Coast clause. The legislature passed an act amending the charter of the City of Galveston, giving the city authority to issue bonds for the construction of a sewage system. This was done without a vote of the taxpayers, as required by Section 7, but the court upheld the action in *Moller v. City of Galveston*.¹⁰⁹ The court reasoned that Section 7 did not prohibit the legislature from giving power to a city on the Gulf to be exercised in some other manner than that set forth in Section 7. In 1925, the legislature passed an act authorizing county and municipal authorities to construct or repair sea walls, etc., and to incur indebtedness and levy taxes for the payment of such indebtedness. This act was upheld in *Holman v. Broadway Improvement Company*,¹¹⁰ even though the vote of the taxpayers was not provided. The court looked at Article III, Section 9, of the Constitution and held it to be controlling. The court argued that the framers of the Constitution had made alternative grants of power on this subject.¹¹¹

2) *Indebtedness clause.* In an early case interpreting the indebtedness clause of Section 7, it was contended that *all* of the provisions of Section 7 applied only to the Gulf Coast counties and cities. The court "assumed" however, that the part of the section relating to the creation of debts applied to all counties.¹¹² The Supreme Court later affirmed this assumption¹¹³ and that interpretation has continued to apply.

The term "debt" used in Section 7 means any pecuniary obligation imposed by contract except those to be satisfied out of current revenues.¹¹⁴ The courts having defined its meaning, have since applied the definition to particular facts in individual cases to see whether the obligation was intended to be paid out of current revenues or not.¹¹⁵

3) *Eminent Domain clause.* The eminent domain clause of Section 7 has been of little significance. The legislature provided

¹⁰⁹ 57 S.W. 1116.

¹¹⁰ *Holmes v. Broadway Improvement Co.*, 300 S.W. 15 (1927).

¹¹¹ *Ibid.*

¹¹² *Mitchell County v. City National Bank*, 43 S.W. 880 (1898).

¹¹³ *Colonial Trust Co. v. Hill County*, 294 S.W. 516 (1927).

¹¹⁴ *McNeill v. City of Waco*, 33 S.W. 322 (1895).

¹¹⁵ See cases listed in *Vernon's Texas Constitution*, Vol. 2, pp. 880-82.

for the exercise of the right of eminent domain by Gulf Coast counties and cities for the erection of sea walls, etc.,¹¹⁶ but the legislature also, without specific constitutional sanction, has authorized *all* counties to exercise the right with respect to roads, airports, flood control and practically any "public purpose."¹¹⁷ The special exception provided for Gulf Coast areas has virtually become general for all local governments in the state. The courts have held that the legislature may delegate the power of eminent domain to such political sub-divisions as it may deem proper.¹¹⁸

Conclusions and Recommendations. Article XI, Section 7, is apparently useless and obsolete. The section is confused in itself and is duplicated by, or conflicts with, other provisions of the Constitution. The legislature has passed general laws authorizing all cities and counties to make permanent improvements for public purposes and all have been granted the right of eminent domain. The special nature of the Gulf Coast areas seems to be special no longer.

An indebtedness clause, similar to the one in Section 7, appears in Article XI, Section 5. This latter clause pertains to cities only, while the clause of Section 7 relates to both cities and counties. It is not necessary to repeat the provision for cities, and the clause applicable to counties should reasonably be in the Article on counties or in the Article on finance.

There is obviously no need for Section 7 as it now stands.

ARTICLE XI, SECTION 8

The counties and cities on the Gulf Coast being subject to calamitous overflows, and a very large proportion of the general revenue being derived from those otherwise prosperous localities, the legislature is especially authorized to aid by donation of such portion of the public domain as may be deemed proper, and in such mode as may be provided by law, the construction of sea walls, or breakwaters, such aid to be proportioned to the extent and value of the works constructed, or to be constructed, in any locality.

History. Article XI, Section 8, was originally adopted in the Constitution of 1876.

¹¹⁶ *Vernon's Annotated Revised Civil Statutes of the State of Texas*, Article 6832.

¹¹⁷ See *Ibid.*, Articles 3264a, 12 69th, 6702, 1150 and others.

¹¹⁸ See *Texas Jurisprudence*, 318; *Porter v. Abilene*, 16 S.W. 107 (1890); *Imperial Irrigation Co. v. Jayne*, 138 S.W. 575 (1911).

Obviously the same reasons for adopting Section 7 would apply to Section 8. Both are, in effect, special legislation for the Gulf Coast area. In a rather unique manner the reasons for this section are contained in its opening words.

There have been no amendments to Article XI, Section 8.

Comparable Provisions in Other Constitutions. There are no provisions in previous Texas Constitutions similar to this one. No comparable provisions appear in the constitutions of other states or in the Model State Constitution.

Interpretations. Before the legislature got around to making donations, the public domain was exhausted. The Supreme Court of Texas held in *City of Aransas Pass v. Keeling*¹¹⁹ that the legislature might extend state aid in any other manner that it might choose. The court tied the grant of aid to Article III, Section 51, which denies the power to grant public money to any individual or municipal corporation, but excepts cases of public calamity.

Conclusions and Recommendations. Article XI, Section 8, is obsolete and of no present use.

ARTICLE XI, SECTION 9

The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation, provided nothing herein shall prevent the enforcement of the vendors lien, the mechanics or builders lien, or other liens now existing.

History. Article XI, Section 9, was originally adopted in the Constitution of 1876.

Tax exemption of public property is as old as taxation itself. The general philosophy of exempting public property from taxation is based on the fact that taxing such property produces no real revenue, but requires additional bookkeeping and administration, thus adding an additional tax burden. It is also believed that one taxing authority should not tax another,¹²⁰ thus Article XI, Section 9, was inserted in the Texas Constitution.

¹¹⁹ *City of Aransas Pass et al v. Keeling, Attorney General*, 247 S.W. 818 (1923).

¹²⁰ *Vernon's Texas Constitution*, Vol. 2, p. 692.

There have been no amendments to this section.

Comparable Provisions in Other Constitutions. All previous Texas Constitutions have had provisions exempting some public property from taxation. Generally, the tax exemptions were to be authorized by two-thirds of the legislature. Article VIII, Section 2, of the Constitution of 1876 provides that the legislature *may* exempt public property used for public purposes from taxation. The provision in Article XI, Section 9, however, is *mandatory* and relates to property of counties, cities and towns. As such, its first appearance is in the Constitution of 1876.

Most states exempt public property from taxation, either by constitutional provision or by law. Some states attempt to itemize public property but others make only general provision. Frequently the exemption of public property from taxation is also applied to religious property.¹²¹

Interpretations. The most difficult feature of Section 9 is the "public purpose" limitation. Courts are not able to develop a logically correct and completely adequate definition of this term.¹²² Most of the cases interpreting this section have decided whether or not specific property is "public."

Conclusions and Recommendations. It is pointless and confusing to have two constitutional provisions relating to tax exemption of public property. Section 9 of Article XI should probably be eliminated, and a simplified general statement accomplishing its purpose should be included in Article VIII.

ARTICLE XI, SECTION 10

The legislature may constitute any city or town a separate and independent school district. And when the citizens of any city or town have a charter, authorizing the city authorities to levy and collect a tax for the support and maintenance of a public institution of learning, such tax may hereafter be levied and collected, if at an election, held for that purpose, two-thirds of the taxpayers of such city or town shall vote for such tax.

History. The provisions of Article XI, Section 10, first appeared in the Constitution of 1876, although references to education appeared in earlier constitutions.

¹²¹ See *Corpus Juris Secundum* (New York: American Law Book Company, 1949, Vol. 2.

¹²² *Vernon's Texas Constitution*, Vol. 2, p. 692.

From the issuance of the Texas Declaration of Independence, which charged the Mexican Government with failure to provide for public education,¹²³ Texans have been concerned with public education. Although earlier constitutions had permitted cities to establish public schools¹²⁴ it was not until the Constitution of 1869 that a uniform system of free public schools was required.¹²⁵ The system was highly centralized in the state and, as did many of the Reconstruction governments' policies, caused a great deal of resentment. After the Democrats regained power in Texas, a law was passed in 1875 which returned control of the schools to the cities. Section 10 of Article XI of the Constitution of 1876 merely reaffirmed the current practice of municipal control of schools.¹²⁶

The grant of power in this section to the legislature was probably included in view of the restriction on local and special legislation found in Article III, Section 56.

There have been no amendments to Article XI, Section 10; however, an amendment to Article VII, Section 3, has affected it.

Comparable Provisions in Other Constitutions. Since municipal corporations were not dealt with in earlier Texas constitutions no similar provision exists. The Constitution of 1836, in the article on General Provisions, provided that "It shall be the duty of Congress, as soon as circumstances will permit, to provide by law a general system of education."¹²⁷ Charters granted to cities often gave the right to establish schools.¹²⁸ The Constitution of 1845 continued the general principle favoring education and provided for municipal taxation to support the schools.¹²⁹ Revenue was uncertain, however, and private support was still the mainstay of the schools.¹³⁰ The Constitutions of 1861 and 1866 contained the same general provisions for education as had that of 1845. The Constitution of 1869 created a centralized state system of public schools and state revenue to support it.¹³¹

¹²³ Gammel, *The Laws of Texas*, Vol. 1, pp. 451-52.

¹²⁴ *Vernon's Texas Constitution*, Vol. 2, p. 698.

¹²⁵ Erickson, *Sources*, p. 119.

¹²⁶ *Vernon's Texas Constitution*, Vol. 2, p. 699.

¹²⁷ Gammel, *The Laws of Texas*, Vol. 1, pp. 1878-79.

¹²⁸ *Ibid.*, p. 1304.

¹²⁹ *Constitution of 1845*, Article X, Section 142.

¹³⁰ *Vernon's Texas Constitution*, Vol. 1, p. 698.

¹³¹ *Constitution of 1869*, Article IX.

Although all state constitutions provide for a system of public education, the provisions are generally found in an article on education or among the legislative powers.

Interpretations. Article XI, Section 10, would probably not have been included in the Constitution had it not seemed necessary because of the prohibition against passage of any special law except as otherwise provided in the Constitution. In the absence of that restriction, no such grant was necessary. Section 10 has been virtually repealed by the constitutional amendment of 1883 to Article VII, Section 3, relating to the same subject. Although that amendment did not expressly repeal Section 10, it has superceded it.

Conclusions and Recommendations. Article XI, Section 10, is out of place in an article on local governments. The subject should properly be placed in an article relating to education, as has been done by amendment to Article 7, Section 3.

ARTICLE XI, SECTION 11

A home rule city may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under civil service shall not be affected hereby.

Provided, however, if any of such officers, elective or appointive, shall announce their candidacy, or shall in fact become a candidate, in any general, special, or primary election, for any office of profit or trust under the laws of this state or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such offices are filled.

A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil officers must elect all of the members of its governing body by majority of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur.

History. Article XI, Section 11, was originally adopted by constitutional amendment on November 4, 1958.

This amendment grew out of the fact that some Texas cities had assumed that under their home rule charters they could fix the term of office of city officials at a longer term than two years. The amendment legalized the existing practice in some cities and allowed others to lengthen the terms of office.¹³²

There have been no amendments to this section.

Comparable Provisions in Other Constitutions. There is a general trend toward lengthening terms of office from two to four years. This trend is reflected in several constitutions and in many recommendations for change. The Model State Constitution makes no mention of terms of office, evidently believing that home rule cities might choose their own length of term.

Interpretations. There have been no interpretations of Section 11.

Conclusions and Recommendations. This provision should remain although it could better be worked into a more logical position in the Constitution. It is much too long and wordy and, in a revised constitution, could be stated simply and briefly. It is possible that flexible terms of office should be provided and that no limit should be placed on home rule cities.

CONCLUSIONS

Article XI is entitled *Municipal Corporations* and is very poorly written and extremely difficult to interpret. Much of it is presently inapplicable or obsolete and few of its provisions stand alone without reference to other parts of the Constitution or to statutes which either give them meaning or explain them away.

Although counties are not commonly called Municipal Corporations they are legally included in the definition of that term. Since, however, the Texas Constitution contains an article entitled *Counties* (Article IX) it would be much more appropriate for the material pertaining to counties to be located there instead of in the article entitled *Municipal Corporations*. Of the eleven sections included in article XI, two sections relate only to coun-

¹³² See for example, the City of Lubbock Charter.

ties (Sections 1 and 2), four relate only to cities (Sections 4, 5, 10, and 11), and five relate to both cities and counties (Sections 3, 6, 7, 8, and 9).

References to cities and counties are scattered throughout the Texas Constitution. It is true that all references to a single subject cannot be in one location in a constitution, but revision could certainly improve the organization of material on local governments. In no one place can even most of that material be found and one reads the articles on the subjects of counties and municipalities without gaining much information on the subject.

Article XI shows the spirit of the constitution makers in their reaction against several abusive actions of the previous Reconstruction government. It shows a fear of the abuse of power and a desire to limit governmental action. Also, it demonstrates a dilemma which was difficult to overcome. On the one hand, there was a desire to return local government to the localities. On the other hand, there was a need for some special legislation for some local governments. The framers of the Constitution resorted to some exceptions to general policy, and to some special legislation in the Constitution. Neither practice is good for a constitution.

Article XI, as such, has only two significant provisions: those relating to general law cities, and those relating to home cities. Both are the results of amendments and represent partial or "patch-work" provisions. Both could be re-written in a revised constitution in a better manner. Most of the remainder of Article XI is obsolete, unnecessary, improper, or out of place. Revision is highly desirable.

It is recommended that in a revision of the Texas Constitution there should be an article on Local Government. Such an article should include the necessary information on counties and cities and any other local governmental units that should be provided for in a constitution. Emphasis should be given to home rule and to flexibility, and subjects that could best be left to legislation should not be included in the constitution.

A constitution should confine itself to fundamentals and should not include subjects or examples that may require frequent

change, or which may soon become obsolete. Broad general terms are best for constitutional construction, and details should be left for legislation.

CHAPTER III

LOCAL AND SPECIAL LAWS

Introduction. The subject of local and special laws passed by the legislature and applying only to particular localities has long been a problem of state-local relationships. The practice stems from the fact of legal supremacy of the state government and the early practice of incorporating municipal governments by special charters issued by the legislature.¹³³ The special charter system was almost universally used in the early history of this country but abuses on the part of the state legislatures led to movements to limit their power to pass special and local laws.¹³⁴ In Texas, the defects of legislative superiority became apparent under a system whereby a predominately rural legislature meeting for sixty days every two years was attempting to solve problems of police, fire, health, streets, etc., in cities spread from Texarkana to El Paso.¹³⁵

Two areas of the Texas Constitution aim specifically at the problem of local and special laws. One approach resulted in limiting local and special laws by requiring that municipal charters might be granted only by general law or in accordance with the home rule provisions. These requirements are explained in the analysis of Article XI (Municipal Corporations).

The second approach to limiting local and special laws is key-noted by Article III, Section 56, of the Constitution. This section sets the theme of restriction against local and special laws passed by the legislature. It enumerates several specific subjects which shall not be the object of local and special laws, and concludes with an "elastic clause" prohibition including "all other cases where a general law can be made applicable." Section 57 follows with a procedural requirement of notice and publicity in the event some law of a local or special nature is contemplated.

¹³³ *State-Local Relations*, Report of the Committee on State-Local Relations, (Council of State Governments, 1946), pp. 145-55.

¹³⁴ *Ibid.*

¹³⁵ John P. Keith, *City and County Home Rule in Texas*, p. 13.

Several other provisions of the Constitution relate to local and special laws either directly or indirectly. These sections are briefly noted.

ARTICLE III, SECTION 56

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing: The creation, extension or impairing of liens; Regulating the affairs of counties, cities, towns, wards or school districts; Changing the names of persons or places; Changing the venue in civil or criminal cases; Authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys; Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State; Vacating roads, town plats, streets or alleys; Relating to cemeteries, grave-yards or public grounds not of the State; Authorizing the adoption or legitimation of children; Locating or changing county seats; Incorporating cities, towns or villages, or changing their charters; For the opening and conducting of elections, or fixing or changing the places of voting; Granting divorces; Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts; Changing the law of descent or succession; Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate; Regulating the fees, or extending the powers and duties of aldermen, justices of the peace, magistrates or constables; Regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes; Fixing the rate of interest; Affecting the estates of minors, or persons under disability; Remitting fines, penalties and forfeitures, and refunding moneys legally paid into the treasury; Exempting property from taxation; Regulating labor, trade, mining and manufacturing; Declaring any named person of age; Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or his securities from liability; Giving effect to informal or invalid wills or deeds; Summoning or impaneling grand or petit juries; For limitation of civil or criminal actions; For incorporating railroads or other works of internal improvements; And in all other cases where a general law can be made applicable, no local or special law shall be enacted; provided, that nothing herein contained shall be construed to prohibit the Legislature from passing special laws for the preservation of the game and fish of this State in certain localities.

History. Early Texas Constitutions contained little detail and few provisions on local government.¹³⁶ The "Plan and Powers of the Provisional Government of Texas," adopted in 1835, carried few limits on governing power.¹³⁷ It was superseded the following year by the Constitution of the Republic of Texas which contained a prohibition against appropriations for private and local purposes.¹³⁸

The Constitution of 1845 which was adopted when Texas became a State in the Union contained a few additional limits on special and local laws.¹³⁹ These provisions were continued in the Constitutions of 1861 and 1866.¹⁴⁰

The Reconstruction Constitution of 1869 recognized the problem of special and local laws and reflected a trend that had become evident in the nation¹⁴¹ by prohibiting legislative power over certain subjects by "private or special law," and requiring action "by general laws."¹⁴²

The restrictions of the Constitution of 1869 proved to be of little worth as about 79 per cent of the legislation of the session of 1870-71 dealt with special and local laws.¹⁴³ Popular revulsion led to a special law amendment in 1873 which was to serve as a basis for Article III, Section 56, in the new Constitution.¹⁴⁴

Criticism of the abusive actions of the Reconstruction government led to agitation for a new constitution when the Democrats regained political power in Texas.¹⁴⁵ In the Constitutional Convention of 1875, Mr. Robertson, of Bell, offered a resolution providing that "The Legislature shall pass no special law when a general law can be made applicable."¹⁴⁶ The Committee on the Legislative Department, however, chose to enumerate items which should not be the subject of local or special laws, concluding the

¹³⁶ See discussion of Article XI, Section 4, *Infra* p. 13.

¹³⁷ *Vernon's Texas Constitution*, Vol. 1, pp. 649-50. Also see Keith, *Home Rule*, pp. 13-15.

¹³⁸ *Constitution of 1836*, Article II, Section 25.

¹³⁹ *Constitution of 1845*, Article VII, Section 18, 31.

¹⁴⁰ *Vernon's Texas Constitution*, Vol. 1, p. 750.

¹⁴¹ Keith, *Home Rule*, p. 14.

¹⁴² See Article XII, Section 13, and Article III, Section 25 of the *Constitution of 1869*.

¹⁴³ Keith, *op. cit.* p. 14.

¹⁴⁴ Keith, *op. cit.* p. 15

¹⁴⁵ McKay, *Seven Decades*, pp. 47-78.

¹⁴⁶ *Journal of the Constitutional Convention of 1875*, p. 139.

list with a general statement similar to that proposed by Mr. Robertson.¹⁴⁷ This enumeration became the basis for Article III, Section 56, of the Constitution of 1876. (Section 57 was also included as a companion statement to Section 56. See also Article XI, Section 4, as a similar statement pertaining to city charters).

Comparable Provisions in Other Constitutions. As indicated above, the broad prohibition against local and special laws first appeared in the Texas Constitution of 1876. This provision not only grew out of the abuses of the Reconstruction period but it also reflected a trend in other states. Many instances of abuse of legislative power had led to provisions in many state constitutions restricting the authority to pass local and special laws.¹⁴⁸

Several methods of constitutional limitation on the legislative power over local and special laws have been tried in state constitutions. Generally, these restrictions fall into three classifications: (1) Prohibiting special, private, or local laws in any situations which can be covered by general law; (2) Listing in the constitution subjects which cannot be dealt with by special or local laws; and (3) Requiring that all general laws be uniform in their operation throughout the state.¹⁴⁹ There is also a procedural requirement in some constitutions that requires notice before enactment of a special or local law.¹⁵⁰ In prohibiting local and special laws some state constitutions add the limitation that general laws may not be amended to become special, private, or local, nor may general laws be made local or special by partial repeal of a general law.¹⁵¹ Further stricture against this type of legislation is found in some constitutions by a statement prohibiting general laws from including or embracing provisions of a private, special, or local character.¹⁵² Still other state constitutions require that local and special laws shall not be effective until approved by the voters of the locality affected.¹⁵³

¹⁴⁷ *Ibid.*, pp. 165-66.

¹⁴⁸ Graves, *American State Government*, (D. C. Heath & Co.: Boston, 1953), pp. 283-86.

¹⁴⁹ *Ibid.*, p. 284.

¹⁵⁰ *Index Digest of State Constitutions*, 2nd Ed., (Columbia University, 1959), pp. 938-9.

¹⁵¹ *Ibid.*, p. 939.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, p. 940.

Article III, Section 56, combines several of these methods. It contains a long list of subjects that shall not be the subject of local and special laws. It also carries a general statement covering "all other cases where a general law can be made applicable" (with an exception for the preservation of game and fish). Companion Section 57 requires notice of intention before enactment.

Such illustrations prove that the subject is an important one in constitutional state-local relations. Evidence seems to indicate, however, that in spite of constitutional prohibitions against local and special laws, many state legislatures have ignored the restrictions and the volume of such legislation has continued.¹⁵⁴ One prominent method of enacting local laws in the guise of general laws has been by legislative classification. Classification may be attempted on a subject-matter basis, a geographical basis, or on a population basis.¹⁵⁵ The latter type of classification is frequently used in Texas.¹⁵⁶

Interpretations. A considerable amount of litigation has occurred interpreting Section 56 of Article III.¹⁵⁷ The courts have held that legislative determination as to what constitutes a general law, carries much weight and may be decisive.¹⁵⁸ If persons or things throughout the state are affected by a law, or if people at large are interested in it, it is general, and not local or special.¹⁵⁹ A general law need not apply equally to all parts of the state so long as it applies equally in the territory to which it relates.¹⁶⁰

Special or private laws are usually defined as legislation that applies to an individual, association, or corporation, as distinct from general law which applies to the state as a whole.¹⁶¹ Local laws are defined as legislation that applies to any political subdivision or subdivision of the state less than the whole.¹⁶² The Texas courts have held that the terms "local law" and "special law," as used in the Constitution, are synonymous.¹⁶³

¹⁵⁴ Graves, *op cit.*, p. 288.

¹⁵⁵ *Ibid.*, p. 286.

¹⁵⁶ Benton, W. E., "Population Brackets as a Method of Classification", *Southwestern Social Science Quarterly*, Sept., 1950, pp. 117-135.

¹⁵⁷ See *Vernon's Texas Constitution*, Vol. I, pp. 751-769.

¹⁵⁸ *Handy v. Johnson*, D. C. 51F. 2d 809.

¹⁵⁹ *Ibid.* See also *Lower Colorado River Authority v. McGraw*. 125 T. 268.

¹⁶⁰ *Cordova v. State*, 6 Cr. S. 207.

¹⁶¹ Graves, *op. cit.*, p. 283.

¹⁶² *Ibid.*, p. 285.

¹⁶³ *Stephenson v. Wood*, Civ. app., 35 S.W. 2d 794.

The courts explain that the purposes of the prohibition against local and special laws are to prevent the granting of special privileges, to secure uniformity of the law, and to suppress "log-rolling" in the legislature.¹⁶⁴ Classification of subjects for the purpose of legislation has long been considered legitimate, so long as the classification is not arbitrary, unreasonable, or discriminatory.¹⁶⁵ Classification should bear a just and reasonable relation to the object of the law and should operate equally, uniformly, and impartially on all persons and property of the same class.¹⁶⁶

Although a great deal of classification is legitimate, the legislature has frequently used this method of circumventing the prohibitions of Section 56. The Texas Courts have permitted a great deal of legislation under the guise of classified general laws, which are really local laws.¹⁶⁷ It has been held that a law is general even though it applies to only one county, if it is not fixed so as to prevent it from ever applying to other counties.¹⁶⁸ On the other hand, if the classification is arbitrary, or without basis in fact and reason, then it may be declared unconstitutional.¹⁶⁹

Statutes classifying cities by population for charter purposes are legitimate and do not violate the restriction against local laws,¹⁷⁰ nor do those laws prescribing minimum salaries or civil service status for firemen and policemen in cities of a certain population¹⁷¹ violate this restriction.

On the other hand some classification laws of Texas have been declared unconstitutional as violating the prohibition of Section 56.¹⁷² In other cases passage of a laws has been stopped because of an opinion by the Attorney General that such a law would violate Section 56.¹⁷³

Conclusions and Recommendations. Experience has shown that

¹⁶⁴ See *Miller v. El Paso County*, 136 T. 370; *State v. McDonald*, Civ. App., 220 S.W. 2d 732; *Rodriguez v. Gonzales*, 148 T. 537.

¹⁶⁵ *Corpus Juris Secundum*, Vol. 16, p. 995.

¹⁶⁶ *Ibid.*, p. 1000.

¹⁶⁷ *Benton, op. cit.*

¹⁶⁸ *Bexar County v. Tynan*, 128 T. 223.

¹⁶⁹ *Miller v. El Paso County*, Civ. App., 146 S.W. 2d 1027, 136 T. 370, 150 S.W. 2d 1000.

¹⁷⁰ *Hunt v. Atkinson*, 18 S.W. 2d 594; *City of Houston v. Allred*, 123 T. 334.

¹⁷¹ *Dry v. Davidson*, 115 S.W. 2d, 689; *Austin Fire and Police Department v. City of Austin*, 224 S.W. 2d 337.

¹⁷² For example see *Anderson v. Wood*, 137 T. 201; *Oakley v. Kent*, 181 S.W. 2d 919; *Kitchens v. Roberts*, 24 S.W. 2d 464.

¹⁷³ *Op. Atty. Gen.* Nos. 0-3654, 0-2329, 0-1020, 0-1986, 0-3314, and many others.

some type of restriction on the legislative power to pass local and special laws is desirable. On the other hand, it has been demonstrated that such constitutional prohibitions are almost worthless unless they are observed by the legislature and enforced by the courts.

At the same time there is a need for certain types of local legislation. It is ridiculous to have to pass constitutional amendments to make exceptions to the rule against local legislation when laws would suffice. One example of this dilemma is shown in Texas by the constitutional amendments authorizing special districts of various kinds and the series of amendments to Article III, Section 51, and Sections 59, 60, and 61 of Article III, permitting workmen's compensation for state, county and municipal employees.

This dilemma of the need to guard against special and local laws on the one hand, and the need for certain types of local legislation on the other, must be taken care of in the Constitution.

It is suggested that the basic limitation on special and local laws should be continued in the constitution. It might best be stated in a general way rather than containing the long detailed statement that appears in Section 56 of the Texas Constitution. At the same time adequate provision should be made for local discretion without particular state authorization in the form of broad home rule provisions.

It has been suggested that there is need for a new approach to the broad field of state-local relations due to recent recognition of the "phenomena of galloping urbanization and sprawling metropolitanism."¹⁷⁴ The issue is more complex than just state meddling or local self-government, and requires recognition of the problems of metropolitan growth, special districts and the whole field of intergovernmental relations.¹⁷⁵

¹⁷⁴ Mimeographed paper delivered at 55th Meeting of the American Political Science Association, Washington, D. C., September 10-12, 1959, by John P. Wheeler, Jr., and John E. Bebout, "Recent Thinking About State Constitutions", p. 9.

¹⁷⁵ *Ibid.* See also the excellent study, *State-Local Relations*, Report of the Committee on State-Local Relations, (Council of State Governments, 1946); and comments and papers at the 66th National Conference on Government, sponsored by the National Municipal League, Phoenix, Arizona, Nov. 13-16, 1960.

ARTICLE III, SECTION 57

No local or special law shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of such bill and in the manner to be provided by law. The evidence of such notice having been published, shall be exhibited in the Legislature, before such act shall be passed.

Comment. This section is supplementary to Section 56 and requires a procedure when any local or special laws, not absolutely prohibited by Section 56, are proposed. The requirement is for publicity of intent to pass such a law, apparently so that individuals affected would have knowledge of it and that local sentiment might have time to be expressed, favorably or unfavorably.

Such a requirement is contained in several state constitutions¹⁷⁶ and is one method of further controlling local and special laws. Its effectiveness is doubtful.

Recommendation. As stated above in the conclusions concerning Section 56, it is desirable to retain a restriction against local and special laws. If the restriction is general, no provision for notice would be necessary. This section should be considered along with Section 56 in its revised form.

Local and Special Laws—Other Provisions. In addition to the principal restriction on legislative enactment of local and special laws contained in Article III, Section 56, several other provisions of the Texas Constitution affect this subject either directly or indirectly. Section 57 of Article III has already been noted as a supplementary statement to Section 56.¹⁷⁷ Likewise, Article XI, Section 4, has been discussed as a requirement that cities with a population of five thousand inhabitants or less shall be chartered by general law only.¹⁷⁸

Other constitutional provisions that relate to the subject of local and special laws are as follows:

1) Article III, Section 50. This section precludes the legislature from giving or lending (or authorizing the giving or lend-

¹⁷⁶ *Index Digest of State Constitutions*, p. 938.

¹⁷⁷ *Supra.*

¹⁷⁸ *Supra.*

ing) the credit of the state in aid of any person, association or corporation. This section obviously prevents legislation favoring any person or group which would come under the heading of special laws. An exception to the general rule was adopted as a constitutional amendment in 1952 in order to allow grants, loans, and scholarships to medical students under certain conditions.¹⁷⁹

2) Article III, Section 51. This section originally prohibited the legislature from making any grant of public monies to any individual, association, or corporation. If such were done it would be a special or local law. This section is supplementary to the prohibition contained in Section 50. The prohibition was so broad and sweeping that it has resulted in many amendments.¹⁸⁰ Section 51 itself was amended in 1894, 1898, 1904, 1910, 1912, and 1928—all amendments relating to the treatment of Confederate veterans.

3) Section 51a. This section provided payments to the needy, aged, blind, and children, and in 1945, consolidated four earlier amendments dealing with social security; it has since been amended in 1954 and again in 1957.

4) Section 51a-1. This section provided medical care for the needy, aged, blind, children, and disabled. It was adopted in 1958.

5) Section 51b. This section created a State Building Commission and authorized a building fund. This fund in turn affected the Confederate Pension Fund and thus is related to Section 51 as amended.

6) Section 51c. This section provided compensation to persons fined or imprisoned when not guilty. It was adopted in 1951. There is some uncertainty as to this section since *Vernon's* does not include it as Section 51c, while other authorities do.¹⁸¹

7) Section 51e. This section provided retirement and pensions for municipal authorities. It was adopted in 1944 to allow cities to establish retirement and pension systems.

8) Section 51f. This section provided retirement systems for

¹⁷⁹ Article III, Section 50a.

¹⁸⁰ See section on Compensation, Pensions and Retirement Systems.

¹⁸¹ MacCorkle and Smith, *Texas Government*, p. 429.

municipal employees. It was also added in 1944. This section authorized the state legislature to provide for a voluntary system of retirement and disability pensions for municipal employees. Why Sections 51e and 51f were not combined into one statement is uncertain.

9) Section 51g. This section authorizes the legislature to pass laws enabling proprietary employees of political subdivisions to be covered by the federal social security program. It was adopted in 1954.

10) Article III, Section 52. This section originally prohibited the legislature from authorizing any county, city or town, or other political subdivision to lend its credit or grant money to any individual, association or corporation. It is thus similar to and somewhat repetitive of Sections 50 and 51. In 1904 Section 52 was amended to allow political subdivisions to issue bonds, upon the vote of two-thirds of the resident property taxpayers, for certain purposes. This amendment grew out of the need for water conservation practices and for roads.¹⁸² This amendment also created a new type of taxing unit called "districts" for conservation and road-building purposes.¹⁸³ Further amendment of this section occurred in 1917 (See Article XVI, Section 59) when the limit on indebtedness allowed by Section 52 was removed. Further legislation followed in the wake of the amendments to Section 52 which affected these special districts.¹⁸⁴ Considerable litigation has occurred interpreting the original limitation as well as the amendments.¹⁸⁵

11) Article III, Section 52b. This section was adopted in 1954 after the legislature had passed a law authorizing the creation of the Texas Turnpike Authority. The intent of the amendment was to make certain that obligations of this Authority, or any other toll-road authority, should not become a charge against the state.¹⁸⁶ Apparently it was believed that the amendments to the original Section 52 might permit toll-road debt to become an obligation of the State unless specifically prohibited.

¹⁸² *Vernon's Texas Constitution*, Vol I, pp. 719-20.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*, pp. 721-34.

¹⁸⁶ *Ibid.*, p. 734.

12) Article III, Section 52d. This amendment, adopted in 1937, applied to Harris County only and was obviously local legislation. It thus was made an exception to the general restriction on local laws. It permitted Harris County to become a taxing road district for a period of five years in order to construct roads and bridges in the county.¹⁸⁷

13) Article III, Section 52. This Section is something of a duplication of other sections of the Constitution which restrain the legislature from passing laws granting money or authorizing local governments to grant money for private purposes. It apparently reflects abuses under the previous Reconstruction government and is another effort to prevent such abuses from recurring. It is, in a minor way, another restriction on the legislature in the passage of special or local laws.

14) Article III, Section 54. This Section grew out of a particular problem of Reconstruction days and was aimed at preventing any special legislation releasing liens on railroads held by the state. It thus intended to prevent a certain type of special legislation which might be detrimental to the state.¹⁸⁸ The provision seems obsolete and useless.

15) Article III, Section 55. This section was aimed at preventing the cancelling of delinquent taxes owed to the state or local government. It, also, grew out of abuses of legislative power in Reconstruction days, when taxes were often cancelled for individuals or for railroads. The Section represents another attempt to prevent special favors or privileges to any individual or groups.

Because of the limitation of this Section, Article XIII, Section 10, was added to allow the legislature to make exception to the prohibition (by $\frac{2}{3}$ vote of each house) in case of great public calamity in any county, city or town.

During the depression of the 1930s, tax delinquency reached such a high level throughout the state that an amendment was added to Section 55, authorizing the legislature to release delinquent taxes which had been due for a period of at least ten years. In a sense, the amendment of 1932 represented an exception to the general rule against special legislation.

¹⁸⁷ This is a problem of special districts, discussed elsewhere.

¹⁸⁸ Vernon's Texas Constitution, Vol. I., pp. 741-42.

16) Article III, Section 59. This Section, adopted as an amendment in 1936, allowed the legislature to pass "special laws" providing for workmen's compensation for state employees. It was deemed necessary to add an amendment to the Constitution to permit this legislation in the light of the prohibitions of Sections 50, 51 and 56.

17) Article III, Section 60. This Section was added by amendment in 1948. It permitted the legislature to pass laws enabling counties to provide workmen's compensation insurance for their employees. It also represents an exception to the general sweeping limitations of the Constitution. (In this instance, to Section 52 of Article III.)

18) Article III, Section 61. This Section allows the legislature to provide workmen's compensation insurance for municipal employees. It was adopted in 1952, and could easily have been incorporated into Section 60.

19) Article V, Section 1a. This Section was added by amendment to permit the legislature to provide a retirement and pension plan for judges. The amendment was necessary because of the previously discussed restrictions.¹⁸⁹

20) Article V, Section 22. This Section allows the legislature to change the jurisdiction of county courts either by local or general law. It is a recognition of the necessity to pass local laws on this subject as the circumstances require.

21) Article VIII. Several sections of Article VIII follow the theme of restriction against local or special laws, while other provisions make specific exception to the general rule. Since Article VIII is analyzed elsewhere no effort will be made here to detail the provisions. Attention is called, however, to Section 1, which requires taxes to be equal and uniform (several amendments have been added to that section); Section 3, which states that taxes shall be levied and collected by general laws and for public purposes only; Section 10, which prohibits the legislature from releasing any persons or property from payment of taxes, except in case of public calamity, and then only by a vote of $\frac{2}{3}$ of each House of the Legislature; Section 19, which exempts farm products in the hands of the producer, and family supplies

¹⁸⁹ See discussion of Compensation, Pensions and Retirement.

for home and farm use from all taxation unless otherwise provided by $\frac{2}{3}$ vote of both houses of the legislature.

22) Article IX, Section 3. This Section was an abortive attempt to provide home rule for counties. It is discussed elsewhere.¹⁹⁰ Other sections of Article IX relate to special districts which are likewise discussed elsewhere.¹⁹¹

23) Article X, Section 4. This Section prohibits the legislature from exempting the property of railroads from the general laws regarding execution and sale.

24) Article X, Section 7. This Section prevents the legislature from granting special rights to construct or operate a street railroad within any city without obtaining the consent of the local authorities.

25) Article XI. The several sections of Article XI have been discussed elsewhere.¹⁹² Sections 4, 5, 7, and 8, relate to the subject of local and special laws.

26) Article XII, Sections 1 and 2. These Sections require that all private corporations be created only by general laws.

27) Article XIV, Section 3. This Section prohibits the legislature from granting any public land to a railroad except under specified conditions. It further provides that the legislature shall pass general laws only to effectuate the provisions of the section. This is another restriction on special legislation favoring the railroads.

28) Article XVI, Section 6. This Section is another statement prohibiting appropriations for private or individual purposes, that is, special legislation.

29) Article XVI, Section 20. This Section authorizes the legislature to provide for local option for the sale of intoxicating liquors, thus permitting local laws upon the adoption by the voters of the prescribed locality.

30) Article XVI, Section 22. This Section permits the legislature to pass local fence laws applicable to any subdivision of the state, as may be needed.

31) Article 16, Section 23. This Section specifically permits the legislature to pass special and local laws for the regulation of

¹⁹⁰ See discussion of Article IX.

¹⁹¹ This is a problem of special districts, discussed elsewhere.

¹⁹² See discussion of Article XI.

live stock and the protection of stock raisers. It requires any local law thus passed to have the approval of the freeholders of the section affected.

32) Article XVI, Section 31. This Section allows the legislature to pass laws prescribing the qualifications of practitioners of medicine but further provides that no preference shall be given to any schools of medicine.

33) Article XVI, Section 43. This Section prohibits the exemption, by special law, of any person or "set of men" from the performance of any public duty imposed by general law. Exemptions shall be by general law only.

34) Article XVI, Section 55. This Section permits the legislature to provide pensions for soldiers of the war of independence, signers of the Declaration of Independence, and the widows of those two groups who remain unmarried. The condition is made, however, that the pension be granted only to those who can prove indigent circumstances.

35) Article XVI, Section 59. This Section, adopted in 1917, authorizes the legislature to create reclamation and conservation districts which shall be governmental agencies, with the power of taxation and indebtedness. The section is thus a further exception to the restrictions against local laws and in a sense, is an additional amendment to Article III, Section 52, in that it removed the limitation on indebtedness established by the amendment of 1904, to that section.

36) Article XVI, Section 59. This Section, adopted in 1946, was necessary in order to pay for a building at John Tarleton Agricultural College (Now Tarleton State College) because of an error and a technicality. A constitutional amendment was required to pay for a building that had been constructed in good faith. This is an extreme example of constitutional amendment authorizing the legislature to pass a local and special law. This section is missing in Vernon's *Constitution*, which is the official copy of the Constitution.

CONCLUSION

The subject of local and special laws is a broad one and many of the sections listed above are not directly pertinent to local

government. On the other hand, the many references to general laws rather than local and special laws, and the many constitutional amendments that have been added to create exceptions to the general rule, spot-light the importance of the subject.

The framers of the Constitution of 1876 had experienced abuse of power. They tried to guard against future abuses by constitutional restrictions on power. These restrictions were frequently so broad as to require amendments when changed conditions created new problems. Most of the amendments have been grants of power to the legislature permitting or authorizing certain types of legislation.

Two observations become significant upon analysis of this phase of the Constitution. First, the amendments might not have been necessary if a broader interpretation had been given to the original constitutional provisions. Instead, the legislative powers have sometimes been construed narrowly and the limitations on power construed strictly so that amendments seemed necessary in order to exert a power. This type of construction has been given by the courts, the attorney general, and apparently by the legislature itself.

Secondly, it should be noted that in the process of amendment, the legislature has further complicated the Constitution by writing the amendments in considerable detail. Instead of making a broad amendment creating legislative power on a subject, the usual procedure has been to detail the amendment to the particular subject at hand. Thus, when a similar problem arises a new amendment is necessary to care for it. An excellent example of this procedure is found in the many amendments relating to retirement and pension funds.

In some respects the amendment method has become a sort of referendum process, but without the usual machinery to make it a real referendum. The legislature has included much material in constitutional amendments that is statutory in nature. The result is a complicated constitution, difficult to read, difficult to interpret, and difficult to understand. Reading and study of the document is discouraged, and an understanding of the Constitution, as the fundamental basis of Texas government, is virtually impossible.

The entire area of general laws versus local and special laws might well be examined with a view toward simplification, clarification and modernization.

CHAPTER IV

MUNICIPAL PERSONNEL

Introduction. A number of scattered references relating to municipal personnel are contained in the Texas Constitution. Some provisions are aimed directly at municipal officers and employees while others merely refer to "all officers of the state." Some provisions are clear in their intent while others are somewhat indefinite. Thus, the application of the provisions relating to personnel has been determined largely by judicial interpretation.¹⁹³

Since there is no clear pattern of constitutional arrangement relating to municipal personnel, the various provisions are analysed under the two broad headings of "Qualifications and Terms of Office" and "Compensation, Pensions and Retirement Systems." The provisions affecting the former category are found in Article XVI of the Constitution and are, for the most part, fairly simple. The section that has been the most troublesome is Article XVI, Section 30, which limited the term of all offices, not otherwise fixed by the Constitution, to two years. This restriction has been the subject of several amendments, and insofar as it affects municipal personnel, has virtually been amended out of existence.

The second grouping of provisions under the heading of "Compensation, Pensions and Retirement Systems" is somewhat more indefinite in its scope. The approach to the analysis of this subject has been to begin with the constitutional restrictions that have affected the subject, and then to point out the constitutional amendments that have been required to overcome the limitations.

QUALIFICATIONS AND TERM OF OFFICE

Introduction. In spite of the fact that terms of office for municipal office holders are not fixed in the Constitution, there are a number of constitutional references to qualifications and terms.

¹⁹³ *Texas Jurisprudence*, Vol. 30A, p. 163.

Some provisions relate specifically to municipal officers, and others apply to all officers. The statements are scattered and do not form a pattern.

No attempt will be made to analyse each section thoroughly, but comment will be made on the sections separately.

ARTICLE XVI, SECTION 1

OFFICIAL OATH.—Members of the Legislature, and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, ..., do solemnly swear (or affirm), that I will faithfully execute the duties of the office of of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not, directly nor indirectly, paid, offered, or promised to pay, contributed nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God."

The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, ..., do solemnly swear (or affirm), that I will faithfully execute the duties of the office of of the State of Texas, and will to the best of my ability preserve, protect and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not, directly nor indirectly, paid, offered, or promised to pay, contributed nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or the confirmation thereof. So help me God."

Comment. This section states that "all officers" shall take the official oath of office, which the section details.¹⁹⁴ Although it does not specifically include municipal officers it is held to apply to every person elected or appointed to an office under Title 28.¹⁹⁵

Recommendation. It is customary for officials to take an oath of office as prescribed in the Constitution. The oath itself might need modification but the principle should be retained.

¹⁹⁴ The oath itself was amended in 1938 to take out the dueling clause and effect some other changes.

¹⁹⁵ *Texas Jurisprudence*, Vol. 30A, p. 175.

ARTICLE XVI, SECTION 2

RIGHT OF SUFFRAGE TO BE PROTECTED; CRIMINALS DISFRANCHISED.—Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult, or other improper practice.

ARTICLE XVI, SECTION 4

DUELING PROHIBITED.—Any citizen of this State who shall, after the adoption of this Constitution, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this State or out of it, or who shall act as second, or knowingly assist in any manner those thus offending, shall be deprived of the right of suffrage, or of holding any office of trust or profit under this State.

ARTICLE XVI, SECTION 5

BRIBERY IN ELECTIONS DISQUALIFICATION FOR HOLDING OFFICE.—Every person shall be disqualified from holding any office of profit, or trust, in this State, who shall have been convicted of having given or offered a bribe to procure his election or appointment.

These three sections are carry-overs from the Constitution of 1845.¹⁹⁶ They state disqualifications for office holding which were probably important in early Texas. The dueling provision is obsolete today and the others are of doubtful value. It would probably be desirable for municipalities to fix their own qualifications for office or for the legislature to prescribe them by general law.

Recommendation. These sections as they affect office holding should probably be deleted from the Constitution, and whatever substance is desirable should be provided by law or charter.

ARTICLE XVI, SECTION 9

ABSENCE ON BUSINESS OF THE STATE OR UNITED STATES SHALL NOT FORFEIT A RESIDENCE ONCE OBTAINED.—Absence on business of the State, or of the United States, shall not forfeit a residence once obtained, so as to deprive

¹⁹⁶ Ericson, *Sources*, pp. 202-3.

anyone of the right of suffrage, or of being elected or appointed to any office under the exceptions contained in this Constitution.

This section has appeared in all Texas Constitutions since 1845. It was designed to protect a person from losing his voting and office holding rights if he was out of his voting district on official business. It reflects the time required to travel in the early days, but may be of continuing significance today.

Recommendation. This provision should be retained.

ARTICLE XVI, SECTION 10

DEDUCTIONS FROM SALARIES TO BE PROVIDED FOR.

—The Legislature shall provide for deductions from the salaries of public officers who may neglect the performance of any duty that may be assigned them by law.

This section has appeared in all previous Texas Constitutions and reflects a departure from the common law rule that an officer was entitled to compensation as long as he occupied the office, even though he neglected to perform his duties.¹⁹⁷ It also depends upon legislative action and may or may not be of significance.

Recommendation. It is doubtful that this section continues to be of significance. Legislative act or charter provision could probably accomplish any purposes it might anticipate.

ARTICLE XVI, SECTION 12

OFFICERS NOT ELIGIBLE.—No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.

ARTICLE XVI, SECTION 33

CONDITION UNDER WHICH A PERSON CAN NOT RECEIVE COMPENSATION FROM THE STATE.—The Accounting Officers of this State shall neither draw nor pay a warrant upon the Treasury in favor of any person, for salary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this State or the United States, except as prescribed in this Constitution. Provided, that this restriction as to the drawing and paying

¹⁹⁷ *Vernon's Texas Constitution*, Vol. 3, p. 74.

of warrants upon the Treasury shall not apply to officers of the National Guard, the National Guard Reserve, and the Organized Reserve Corps of the United States, nor to enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, nor to retired officers of the United States Army, Navy, and Marine Corps, and retired warrant officers and retired enlisted men of the United States Army, Navy, and Marine Corps.

ARTICLE XVI, SECTION 40

PERSONS TO HOLD ONLY ONE CIVIL OFFICE OF EMOLUMENT AT A TIME; EXCEPTIONS.—No person shall hold or exercise, at the same time, more than one Civil Office of emolument, except that of Justice of Peace, County Commissioner, Notary Public and Postmaster, Officer of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States and enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, and retired officers of the United States Army, Navy, and Marine Corps, and retired warrant officers, and retired enlisted men of the United States Army, Navy, and Marine Corps, unless otherwise specially provided herein. Provided, that nothing in this Constitution shall be construed to prohibit an officer or enlisted man of the National Guard, and the National Guard Reserve, or an officer in the Officers Reserve Corps of the United States, or an enlisted man in the Organized Reserves of the United States, or retired officers of the United States Army, Navy, and Marine Corps, and retired warrant officers, and retired enlisted men of the United States Army, Navy, and Marine Corps, from holding in conjunction with such office any other office or position of honor, trust or profit, under this State or the United States, or from voting at any Election; General, Special or Primary, in this State when otherwise qualified.

Comment. These three Sections say virtually the same thing. They are prohibitions against multiple office holding. Sections 33 and 40 have been amended to make exceptions to the general rule, particularly for the benefit of persons serving in the armed forces.

Recommendation. The subject of these provisions should be retained, but should be consolidated and rewritten.

ARTICLE XVI, SECTION 17

All officers within this State shall continue to perform the duties of their offices until their successor shall be duly qualified.

Comment. This provision was placed in the Constitution to prevent public inconvenience resulting from a vacancy in office.¹⁹⁸ The statement was contained in the Constitution of 1845,¹⁹⁹ and in succeeding Texas Constitutions.²⁰⁰ The section has been interpreted to apply to state and county officers and elective city officers, but not to non-elected officers of municipal corporations.²⁰¹ It does not authorize legislation extending the term of office beyond two years.²⁰² Considerable interpretative litigation has resulted from this section.²⁰³

A great many state constitutions contain a provision similar to Section 17.²⁰⁴

Conclusions. There may be a need for a statement of this type to insure continuation in office. It has had no amendments and seems to pose no obstacle to change.

Recommendation. This section should be continued.

ARTICLE XVI, SECTION 27

In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only.

Comment. This section appeared originally in the Constitution of 1876. Earlier Texas Constitutions seem to have followed the old common law rule that when a vacancy occurred, the office reverted to the king, or, in this country, to the people.²⁰⁵ Early Texas cases declared that where the term of office was fixed by the Constitution, a person filling a vacancy was entitled to the office for the full period.²⁰⁶

The makers of the present Texas Constitution desired uniformity of terms and this provision was inserted to guarantee that elections to vacancies should be for the unexpired term only.

There have been no amendments to this section.

Recommendation. This section should be retained.

¹⁹⁸ *Vernon's Texas Constitution*, Vol. 3, p. 183.

¹⁹⁹ *Ericson, Sources*, p. 203

²⁰⁰ *Vernon's Texas Constitution*, Vol. 3, p. 183.

²⁰¹ *Stubbs v. City of Galveston*, 3 App. C.C. 145.

²⁰² *Texas Jurisprudence*, Vol. 30A, p. 182.

²⁰³ *Vernon's Texas Constitution*, Vol. 3, pp. 183-86.

²⁰⁴ *Index Digest of State Constitutions*, p. 847.

²⁰⁵ *Vernon's Texas Constitution*, Vol. 3, p. 234.

²⁰⁶ *Ibid.*, citing *Banton v. Wilson*, 4 T 400 (1849).

ARTICLE XVI, SECTION 30

The duration of all offices not fixed by this Constitution shall never exceed two years;”

Comment. The portion of Section 30 quoted above was the extent of the section in the original Constitution of 1876.²⁰⁷ It was copied from the Constitution of 1845 and was continued in all other Texas Constitutions.²⁰⁸ The obvious purpose was to limit all terms of office to a maximum of two years. This short term of office was in keeping with the spirit of the early 19th century state constitutions, which generally contained such a limitation.²⁰⁹

The trend in recent years has been toward a longer term of office for state and local officers.²¹⁰ The most common type of constitutional provision relating to officers whose term is not expressly established by the constitution is for all such terms to be fixed by law or by the appointing power.²¹¹

Section 30 of Article XVI has required three specific amendments. The first was added in 1894 and is attached to the original section. It grew out of the creation of the Railroad Commission and the subsequent political fight that developed over the nature and control of this Commission.²¹² The Railroad Commission was, by the amendment of 1894, excused from the restriction of the two-year term and was set up on the basis of six-year, staggered, terms of office for the three commissioners.

The second amendment which altered the original provision was Section 30-b, adopted in 1940.²¹³ Its object was to exempt civil service employees of municipalities from the limits of a two-year term. (See below)

The third amendment is located in Article XI, Section 11, and was adopted in 1958. It allows home rule and general law cities to provide by their charters and by election for terms of office up to four years.²¹⁴

Conclusion. The sweeping restriction of the original Section

²⁰⁷ *Vernon's Texas Constitution*, Vol. 3, p. 270.

²⁰⁸ Ericson, *Sources*, p. 204.

²⁰⁹ Henry G. Hodges, *City Management* (Crofts & Co.: New York, 1939), p. 2.

²¹⁰ Most state constitutions that have been revised have lengthened terms of office.

²¹¹ *Index Digest of State Constitutions*, p. 845.

²¹² *Vernon's Texas Constitution*, Vol. 3, p. 240.

²¹³ See discussion of Article XVI, Section 30b.

²¹⁴ See discussion of Article XI, Section 11.

30 reflected a nineteenth century philosophy which may no longer prevail. It has been amended three times so as to permit exceptions to the rule, and may require more amendments in the future.²¹⁵

Recommendations. The restriction of the two-year term should be deleted. Municipalities have generally been exempted from the rule, but such a limitation should not continue in the Constitution.

ARTICLE XVI, SECTION 30-b

"Wherever by virtue of statute or Charter provisions appointive offices of any municipality are placed under the terms and provisions of Civil Service and rules are set up governing appointment to and removal from such office, the provisions of Article 16, Section 30, of the Texas Constitution limiting the duration of all offices not fixed by the Constitution to two (2) years shall not apply, but the duration of such office shall be governed by the provisions of the Civil Service law or charter provisions applicable thereto."

Comment. This section was adopted as a constitutional amendment in 1940. Its obvious purpose was to overcome the limitations of Section 30 which restricted all offices not otherwise fixed by the Constitution to a term of two years.

With the advent of "civil service" systems in municipal governments, a change was required in the two-year restriction so that persons employed on a merit basis could be assured tenure of office.²¹⁶

Conclusion. Here is another example of an amendment to a broad sweeping restriction, growing out of a need due to changing circumstances. As the "merit system" replaced the "spoils system" of public personnel, the Constitution had to be amended to permit change.

Recommendation. The principle of this section should be retained.

An examination of the sections of the Constitution relating to qualifications and terms of office shows that the subject is treated rather haphazardly. Most of the provisions contain

²¹⁵ A substantial amount of litigation has been required to interpret this restriction. See *Vernon's Texas Constitution*, Vol. 3, pp. 241-44.

²¹⁶ *Vernon's Texas Constitution*, Vol. 3, p. 246; *Texas Jurisprudence*, Vol. 30A, pp. 180-81.

an idea that is desirable and which should probably be retained in the Constitution. (Article XVI, Sections 1, 9, 12, 33, 40, 17, 27, 30-b.) If retained, they should be brought together into a more logical and consistent form, simplified, and arranged so as to avoid duplication.

Some of the provisions are obsolete and unnecessary (Sections 4, 10, 30), and should be removed from the Constitution. Any ideas that these provisions contain that are desirable to continue could be contained in laws or charters.

An analysis of the Texas Constitution as it relates to qualifications and terms of office of municipal personnel shows that some revision is desirable. If emphasis is placed upon the idea of home rule for cities, then most of the rules governing qualifications and terms of office should be left to the local charters. Whatever general requirements are necessary or desirable for the state as a whole could be organized into a logical arrangement in the Constitution. Deadwood could be deleted and the Constitution made more orderly by such a revision.

COMPENSATION, PENSIONS AND RETIREMENT SYSTEMS

Introduction. The framers of the Texas Constitution had experienced abuses of power and improper use of public funds for private purposes during the corrupt days of the Reconstruction Period. In their zeal to prevent such abuses from re-occurring, they placed many restrictions on power in the Constitution of 1876. Among these restrictions were provisions prohibiting use of public money or credit for private purposes.

Such restrictions are, of course, desirable and necessary, but as provided in the Constitution, and interpreted by the courts of the state, they have imposed barriers to pension and retirement systems and have necessitated numerous constitutional amendments. Because of the rather detailed nature of the limitations, the amendments have been correspondingly detailed, and when amendments have been added to amendments the Constitution has become cluttered and confused.

Some of the sections included in this discussion seem somewhat remote to the subject of municipal personnel, but they all form a pattern which has been relative to the subject and which has resulted in several amendments.

The sections which restrict the power to provide pensions and retirement systems are noted and commented upon briefly. These are followed by the amendments which have been added piecemeal, to overcome those restrictions. Conclusions and recommendations are noted at the end of this section.

Restrictions on Power

ARTICLE III, SECTION 44

The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State unless authorized by preexisting law.

This section has appeared in all of the Texas Constitutions²¹⁷ and reflects the popular desire to control the power of the legislature in its compensation of officers or payment for services. It is an effort to insure honesty and to prevent the legislature from wasting the people's money.²¹⁸

A great deal of litigation has involved this section and the courts of the state have, case by case, stated what may and may not be done under its limitations.²¹⁹

Pensions or retirement programs authorized by state law were held not to violate this section.²²⁰

ARTICLE III, SECTION 50

The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other; or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

²¹⁷ *Constitution of 1845*, Article VII, Section 7; *Constitution of 1861*, Article VII, Section 7; *Constitution of 1866*, Article VII, Section 7; *Constitution of 1869*, Article XII, Section 5.

²¹⁸ *Vernon's Texas Constitution*, Vol. I, p. 666.

²¹⁹ *Ibid.*, Vol. I, pp. 667-673.

²²⁰ *Byrd v. City of Dallas*, 118 T. 28, 6 S.W. 2d 738.

This is a companion section of Article III, Section 44, and was new to the Constitution of 1876. It represents a reaction against state subsidies to private enterprises, especially the railroads.²²¹ Such subsidies had been fairly common in earlier days.²²² The prohibition contained in this section does not prevent the legislature from using the credit of the state for state purposes,²²³ but only for private use. Several interpretations have drawn the line showing what may and may not be done under this restriction.²²⁴

A constitutional amendment was deemed necessary to permit the legislature to provide grants, loans, and scholarships to medical students because of the limitation of Section 50. This amendment was added in 1952 and is designated as Section 50a.

ARTICLE III, SECTION 51

The Legislature shall have no power to make any grant, or authorize the making of any grant, or public money to any individual, association of individuals, municipal or other corporation whatsoever; provided, that this shall not be so construed as to prevent the grant of aid in case of public calamity.

This section, as originally stated in the Constitution of 1876, was a brief prohibition against granting public money for private use, except in the case of public calamity.²²⁵ This is another illustration of the reaction against Reconstruction extravagances²²⁶ and was aimed at preventing public funds from being spent for anything other than strictly governmental purposes.²²⁷

Since the language of the prohibitions was so broad and sweeping, it has been necessary to amend this section several times, and it bears little resemblance to the original simple statement. Here again is demonstrated the difficulty of legislating by means of constitutional amendment. Amendment upon amendment upon amendment results in a complicated constitution containing details which clutter up the organization of the document and contribute to its length and confusion.

²²¹ Ericson, *Sources*, p. 189.

²²² *Vernon's Texas Constitution*, Vol. I, p. 697.

²²³ *City of Aransas Pass v. Keeling*, 274 S.W. 818 (1923).

²²⁴ *Vernon's Texas Constitution*, Vol. I, pp. 698-9.

²²⁵ Gammel, *Laws of Texas*, (Austin: The Gammel Book Company, 1898), Vol. VIII, p. 792.

²²⁶ Ericson, *Sources*, p. 189.

²²⁷ *Vernon's Texas Constitution*, Vol. I, p. 701.

ARTICLE III, SECTION 52
(Original of 1876)

The Legislature shall have no power to authorize any county, city, town, or other political corporation, or subdivision of the State, to lend its credit or to grant public money or thing of value, in aid of or to any individual, association, or corporation whatsoever; or to become a stockholder in such corporation, association or company.

In its original form this section was also brief and aimed at a specific abuse. It was included in the Constitution of 1876 to prevent the legislature from authorizing local governments to lend their credit or provide public money for private use. The principal problem was related to railroad construction²²⁸ and in earlier days the counties and cities had petitioned the legislature for permission to aid the railroads so as to assure lines through their communities.²²⁹ The railroads, in turn, threatened to by-pass communities which did not furnish aid;²³⁰ hence, the prohibition was placed in the Constitution of 1876 to stop what had become a rather vicious practice.

As is true of many of the restrictive provisions of the original constitution, amendments became necessary to permit legitimate action quite different from the abuses that had led to the limitation; thus, the section has increased in length and become detailed in nature through the amendment process.

ARTICLE III, SECTION 53

The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

This is a companion section to Article III, Section 44, and extends the prohibitions of that Section to local governments. It was included in the Constitution of 1876 for the same purpose

²²⁸ Ericson, *Sources*, p. 189.

²²⁹ *Vernon's Texas Constitution*, Vol. I, p. 719.

²³⁰ *Ibid.*

as Section 44, that is, to prevent counties and cities from giving away public money where no services are rendered.²³¹

No amendments or changes have been added to this section as such, but it, in combination with Sections 44, 50, 51 and 52, has provided a pattern of prohibitions which required several amendments.

AMENDMENTS TO OVERCOME RESTRICTIONS

Introduction. Article III, Sections 44, 50, 51, 52, and 53 were all placed in the Constitution of 1876 as fairly brief statements limiting the power of the legislature. They were generally aimed toward correcting abuses that had occurred under the Reconstruction government and were rather broad and sweeping in their language. "The Legislature shall have no power . . ." is the theme of the restrictions, and the writers of these sweeping prohibitions had no conception of the amount of litigation nor the number of constitutional amendments that would result from the broad denunciations of power.

Had amendments been properly added, the constitutional confusion that now prevails could have been avoided. But the technique of legislating by amendment for each individual problem that arises has made of the Texas Constitution a patchwork of incongruous details.

The result has been so devastating to the Constitution as a document that the interpretative commentaries can hardly keep up with the amendments and some authorities even differ as to section and sub-section numbers and content.²³² The amendments that have been added as a result of these sweeping restrictions illustrate the "confusion" that prevails.

Since Article III is the subject of another study, the amendments will not be written in full nor analysed completely. They are listed with brief comment to illustrate the constitutional problem of detailed amendments to make exceptions to broad limitations. Only the last few sections apply directly to municipal government but all are included in order to make a more complete picture.

²³¹ *Vernon's Texas Constitution*, Vol. I, p. 736.

²³² See for example, *Vernon's Texas Constitution*, Vol. I, pp. 776-77, and p. 687, and MacCorkle and Smith, *Texas Government*, p. 434, and p. 420.

ARTICLE III, SECTION 48a (November 3, 1936)

This is a constitutional amendment added November 3, 1936, which empowers the legislature to provide for the retirement system for teachers in the public schools and colleges of the state. Although not directly related to the subject of municipalities, it is indicative of the problem growing out of rigid restrictions in the Constitution and narrow construction of powers by the courts.

Section 48 sets the tone of constitutional limitation by stating, "The Legislature shall not have the right to levy taxes or impose burdens upon the people, except to raise revenue sufficient for the economic administration of the government, . . ." ²³³ There follows a short list of subjects (including the protection of the frontier) which are designated as legitimate objects of government spending. Such an approach indicates distrust of legislative discretion and a fear of abuse of power if granted. It also severely handicaps future programs if construed narrowly. The commentaries show that, although several subjects not included in the list were approved by the courts as legitimate objects of governmental spending, others were declared invalid. ²³⁴

Section 48a was apparently necessary as an amendment in order to allow for a teacher's retirement program since that subject was not included in the list of approved items in Section 48.

ARTICLE III, SECTION 50a (November 4, 1952)

Since Section 50 forbids pledging the credit of the state in aid of any person, association or corporation (including municipal), Section 50a was necessary to provide for a State Medical Education Fund when it was thought advisable to establish grants, loans and scholarships for medical students. The sweeping nature of the restrictions required an amendment, which was framed in the usual manner of a detailed exception. If other worthy exceptions should be desired, further constitutional amendment will be required.

²³³ Article III, Section 48.

²³⁴ See *Vernon's Texas Constitution*, Vol. I, pp. 683-85.

ARTICLE III, SECTION 51

The original Section 51 restricted the legislature from granting public money to "any individual, association of individuals, municipal or other corporations whatsoever. . . ." Section 51 has been amended seven times itself, and in addition, Sections 51a, 51b, 51c, 51d, 51e, 51f, and 51g have been added. To further confuse the picture, Sections 51a, 51b, 51c, 51d, had to be amended so there is now some uncertainty as to the organization of this section. *Vernon's Texas Constitution* lists Sections 51, 51a, 51b, 51e, 51f, and 51g, with a note that 51c, and 51d, were by amendment consolidated into Section 51a.²³⁵ *MacCorkle and Smith*, on the other hand, includes Sections 51, 51a, 51a-1, 51b, 51b(again), 51c, 51e, 51f, and 51g. A note points out that Section 51b is misnumbered since there was already a Section 51-b. The notes also indicate that Section 51-d was amended out.²³⁶

The amendments are wordy and detailed, thus causing confusion and requiring more amendments. The first group of amendments to Section 51 related to a Confederate soldier's home and pensions. Seven constitutional amendments are included in this group, and were adopted in 1894, 1898, 1904, 1910, 1912, 1924, and 1928. Most were related to minor details such as amounts of money, dates of residence, age, etc. The last amendment (1924) eliminated several specific details and substituted "such regulations and limitations as may be deemed by the Legislature as expedient."²³⁷ The section remains long, detailed and rather useless since the subject is obsolete.

The next group of amendments to the original Section 51 grew out of the Federal Social Security laws and the need for Texas to participate in that program. The present Section 51a is a result and combination of four earlier amendments on the subject of social security.²³⁸ These earlier amendments were passed in 1933, 1935, and 1937 (two amendments) and were then consolidated and changed somewhat by an amendment in 1945. The

²³⁵ *Vernon's Texas Constitution*, Vol. I, pp. 700-718.

²³⁶ *MacCorkle and Smith, Texas Government*, pp. 245-430.

²³⁷ Article III, Section 51.

²³⁸ *Vernon's Texas Constitution*, Vol. I, p. 709.

1945 amendment was later amended in 1954.²³⁹ Here is another example of legislation by amendment whereby specific details are included in the amendments, which in turn, require later amendment of the details. Had a broad permissive grant of legislative authority and discretion been added, the many amendments would have been unnecessary. The present amendments are long and detailed and will undoubtedly require further amendments in the future.

A third type of amendment to the original Section 51 is contained in a long, detailed section labeled Section 51-b. This amendment, adopted in 1954, creates a State Building Commission and a State Building Fund. It specifies amounts of money and even names the first building to be built. The amendment relates back to Section 51 as amended by reference to the Confederate Pension Fund and the tax involved in that fund. Still another amendment to that amendment which is located in Article VII, Section 17, is referred to in Section 51-b.

Here again is a long, detailed amendment which is more in the nature of legislation. Its nature is such that it does not fit into an organized scheme and it perpetuates the references to the out-of-date, disorganized, Confederate pension provisions of the Constitution.

A fourth group of amendments to the original Section 51 relates to pension and retirement funds for employees of local governments. Sections 51-e and 51-f were passed in 1944, and Section 51-g was added in 1954.

The old Section 51c was consolidated with Section 51a, and a new Section 51c was added in 1956, permitting the legislature to compensate persons who were improperly fined or imprisoned.

ARTICLE III, SECTION 51-e

Sections 51-e and 51-f were added as constitutional amendments in 1944. They were the result of the growing trend to establish pension or retirement systems for governmental employees in pursuance of the modernization of civil service systems.²⁴⁰ Prior to the adoption of Section 51-e there were no

²³⁹ *Ibid.*, pp. 709-11.

²⁴⁰ See W. Brooke Graves, *American State Government* (4th ed.) (Boston: D.C. Heath and Company, 1953), pp. 457-485.

express provisions in the Constitution authorizing cities to enact pension plans for employees, but several laws had been passed by the legislature permitting cities of specified populations to provide pension plans.²⁴¹ Pensions of this type were held to be part of the compensation for services rendered by employees, and not gratuities of public funds for private purposes.²⁴²

In interpreting Section 51-e, the Supreme Court of Texas held that the language of the provision was clear and that it authorized cities to establish pension systems independent of systems provided by the legislature.²⁴³ When a city had so established its own pension plan it had created certain rights, duties and obligations which could not be impaired by legislative action.²⁴⁴

In the light of good personnel policy it is important that municipal governments have the power to establish retirement or pension systems for their employees. Like many sections of the Texas Constitution, Article III, Section 51-e, was added as a constitutional amendment, reflecting a need for power growing out of changed conditions.

The power provided by this section should be continued although it is recommended that all provisions relating to municipal personnel be organized together in a systematized arrangement.

ARTICLE III, SECTION 51-f

This section was adopted in 1944 as a constitutional amendment at the same time as Section 51-e, and is a companion section.

Whereas Section 51-e authorizes municipalities to provide retirement systems of their own, Section 51-f permits the legislature to create a state-wide pension system for employees of cities and towns.²⁴⁵ In pursuance of this authorization the Texas Legislature set up the "Texas Municipal Retirement System" which, as amended, operates today.²⁴⁶

²⁴¹ *Vernon's Texas Constitution*, Vol. I, p. 715.

²⁴² *Byrd v. City of Dallas*, 6 S.W. 2d 738 (1928).

²⁴³ *City of Fort Worth et al. v. Howerton et al.*, 236 S.W. 2d 615 (1951).

²⁴⁴ *Ibid.*

²⁴⁵ *Vernon's Texas Constitution*, Vol. I, p. 716.

²⁴⁶ See pamphlet entitled "The Texas Municipal Retirement Act", including 1959 amendments, distributed by the Texas Municipal Retirement System, 508 Perry Brooks Building, Austin, Texas.

Pensions and retirement systems for municipal employees are desirable and should be continued. The content of Section 51-f should be continued although it should be located in its proper place in the Constitution.

ARTICLE III, SECTION 51-g

Having allowed municipal employees to arrange their own retirement program (51e) or to participate in a state-wide retirement system (51f) it was later necessary to add a constitutional amendment to allow proprietary employees of the political subdivisions to come under the Federal Social Security law as amended in 1950. The Texas Legislature had passed an act in 1951 permitting coverage of county and municipal employees but excluding proprietary employees.²⁴⁷ This amendment was deemed necessary to empower the legislature to arrange social security coverage for proprietary employees.

This is another example of the limiting nature of the Texas Constitution which requires frequent, detailed amendments.

The principle of Section 51g should be retained but should be organized into its proper place in the Constitution.

ARTICLE III, SECTIONS 59, 60, 61

These three amendments were added progressively in order to allow legislation providing for workmen's compensation insurance. Section 59, for state employees, was adopted in 1936; Section 60, for county employees, in 1948; and Section 61, for municipal employees, in 1952.

The three amendments could easily have been combined into one, even though passed at different times. Simpler still, the first amendment (or either of the succeeding ones) might have allowed the legislature to enact laws providing workmen's compensation insurance for *all* governmental employees.

Article XVI, Sections 62, 64, and 66 also relate to retirement programs. Section 62, adopted in 1947, authorizes the legislature to provide for a Retirement, Disability and Death Compensation Fund for the appointive officers and employees of the state and counties.

²⁴⁷ *Vernon's Texas Constitution*, Vol. I, p. 717.

Section 64 provides for the interchange of benefits between the Teacher Retirement System and the Employees Retirement System of the State. It was adopted in 1954.

Section 66 authorizes the legislature to provide a system of retirement and disability pensions for retiring Texas Rangers who did not qualify for benefits from the Employees Retirement System. The amendment refers back to, and affects, Article VII, Section 17, as amended, which in turn had affected Article III, Section 51, as amended. This section was added by amendment in 1958.

CONCLUSION

The Constitution of Texas is considerably cluttered with provisions relating to compensation, pensions and retirement systems. Many of the sections discussed above do not relate directly to municipal personnel but the general restrictions on power which gave rise to amendments dealing with municipal personnel, also stimulated the constitutional amendments affecting other personnel. It is therefore difficult to isolate one segment of the study from its related parts.

All of the compensation and retirement amendments had the approval of the legislature and the voters of the state. Evidently all should have been authorized. The constitutional problem, however, is the methodology of amendment and what this type of amendment does to the Constitution as a document.

Most of the amendments are narrow in scope and apply only to a limited problem. Several of them are very detailed in their content, and because of the detailed nature have required further amendments as conditions have changed.

Thus, the criticism of the Constitution, as it relates to this subject, is not of its content or subject matter so much as its form. It should be possible to write a section or sections that would, in a brief and simple manner, make authorization for compensation, pensions and retirement systems for all government personnel.

Recommendation. The entire subject of compensation, pensions and retirement for government personnel should be reviewed, reorganized, and revised.

CHAPTER V

MUNICIPAL FINANCE

Comment. Municipal revenues are derived principally from taxation and from borrowing. Since debts are ultimately paid from taxes (with some exceptions such as revenue bonds), the taxing power is basic to municipal finance.²⁴⁸

The most important source of municipal revenue is the property tax.²⁴⁹ Other sources include occupation taxes, gross receipts and franchise taxes, fines and fees, charges for services, income from city-owned public utilities, and federal (and other) aid.²⁵⁰

Municipal corporations have no inherent power to levy taxes. They can exercise the power only as it is delegated to them by the state.²⁵¹ Thus, the state constitution and statutes determine the extent of the taxing power.²⁵²

The Constitution of 1876 was the first Texas Constitution to place tax rate limits on municipalities.²⁵³ The Constitutions of 1845, 1860, 1866, and 1869 had not contained such limitations, thus the present Constitution represents a new approach to control over local taxation.²⁵⁴ The reason for the limitations in the Constitution of 1876 grew out of the abuses of the Reconstruction period.²⁵⁵ Extravagances had occurred and the tax rate had risen considerably, thus leading to the restrictions in the Constitution.²⁵⁶ Restrictions have continued since that time in constitutional amendments and in statutes.²⁵⁷

The principal limitations on tax rates for municipal governments are contained in Article XI, Sections 4 and 5. Those provisions have been discussed elsewhere.²⁵⁸ Cities with populations of more than 5000 which operate under home rule charters may

²⁴⁸ Texas Legislative Council, *Local Government*, Part I, (Austin, Texas, 1952), pp. 1-2.

²⁴⁹ *Sources of Revenue for Texas Municipalities*, Texas Legislative Council, (Austin, Texas, 1956), p. ii.

²⁵⁰ *Ibid.*, p. 9.

²⁵¹ *Texas Jurisprudence*, Vol. 30A, p. 494.

²⁵² MacCorkle and Smith, *Texas Government*, p. 353.

²⁵³ *Local Government*, p. 100.

²⁵⁴ *Ibid.*

²⁵⁵ McKay, *Seven Decades*, pp. 40-41.

²⁵⁶ *Ibid.*

²⁵⁷ *Local Government*, p. 101.

²⁵⁸ See analysis of Article XI.

levy taxes at a rate of \$2.50 per hundred dollars,²⁵⁹ while general law cities are limited to a top rate of \$1.50 per hundred dollar valuation.²⁶⁰ Municipalities classified as towns and villages are limited by statute to a levy not to exceed 25¢ per hundred dollar valuation.²⁶¹

Other constitutional and statutory provisions relate to taxation and expenditures by municipalities.²⁶² Some home rule charters also set limitations which are below those permitted by the Constitution and statutes.²⁶³

Texas municipalities do not have any direct constitutional limitations on the amount of tax bonds that a city may issue.²⁶⁴ Instead, the only limit is the indirect one of limitation on the tax rates.²⁶⁵ Revenue bonds are not debts of the municipality as such because they are payable out of earnings.²⁶⁶ All bonds, however, must be submitted for approval to the Attorney General of the State, and registered by the Comptroller of Public Accounts before they can be sold.²⁶⁷

Since Article XI has been discussed in another section of this study, and since a separate study will embrace the broad subject of *Finance*, a section by section analysis of constitutional provisions relating to municipal finance will not be included here. Instead, some problems are noted and some conclusions are drawn which reflect a need for constitutional revision on this subject.

Conclusion. In recent years the problem of municipal finance has been the subject of considerable research and study.²⁶⁸ Population growth and urbanization, inflationary economic conditions, and technological changes and industrialization have all been factors that have placed severe strains on municipal revenue systems.²⁶⁹

²⁵⁹ Article XI, Section 5.

²⁶⁰ Article XI, Section 4.

²⁶¹ *Vernon's Texas Civil Statutes*, Article 1146.

²⁶² *Local Government*, p. 101. Reference is made in the work to a study by Maxwell M. Mahany, *Texas Taxes* (Dallas: Wilkinson Printing Co., 1946).

²⁶³ *Ibid.*, pp. 101-2.

²⁶⁴ *Texas Jurisprudence*, Vol. 30A, p. 495.

²⁶⁵ *Local Government*, p. 142.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, pp. 139-144.

²⁶⁸ See numerous publications of the Council of State Governments, The National Municipal League, and the Bureaus or Institutes of Governmental Research associated with many colleges or universities.

²⁶⁹ *Sources of Revenue for Texas Municipalities*, p. 1.

Several problems relating to municipal finance may be noted without an attempt at evaluation. They are:

1. The heavy reliance on the property tax.
2. The problem of assessment.
3. Overlapping tax jurisdictions.
4. Constitutional and statutory limits on power.
5. Pre-emption of certain taxes by state and national governments.
6. Exemption of subjects of taxation.
7. The maze of general and special laws.

The mere statement of these problems evidences the need for a new and modern approach to municipal finance. Some reforms that have been suggested include:

1. Removal of constitutional tax rate limitations.
2. Provision for home rule power to tax.
3. Codification and simplification of state laws.
4. Authorization of new sources of revenue.
5. State aid for certain functions.
6. Provision for borrowing at law rates.
7. State administrative supervision and aid.

Any constitutional revision should include a re-working of the constitutional bases of municipal finance. The 1876 approach with its suspicion of power and its emphasis on limitations is not adequate for the modern problems of municipal government.

Recommendation. The provisions relating to municipal finance should be thoroughly revised.

CHAPTER VI

GENERAL CONCLUSIONS AND RECOMMENDATIONS

The conclusions at the end of each section of this study have indicated a definite need for revision of the subjects analyzed. The general conclusion from the entire study is that the Texas Constitution should be thoroughly revised as it relates to municipal government. Since the subject of municipal government is so interwoven into other areas of the Constitution it would be difficult, if not impossible, to revise only the sections relating to municipal government. A complete constitutional revision is thus indicated.

The principal article governing municipal government is Article XI. It has been found to be entirely inadequate as a constitutional basis for municipal governments. Similarly the studies on local and special laws, municipal personnel, and municipal finance demonstrate the need for constitutional revision. Piecemeal amendment to solve individual and particular problems has only led to greater constitutional confusion. The document has become "cluttered" with inconsistent and unnecessary trivia which detract from the Constitution as a document and make government under that Constitution difficult.

Without question, the problems of municipal government are growing more complex. Current research is emphasizing the interrelationship of units of government and the difficulty of solving problems on the traditional separate levels of city, county, and state. The problems of metropolitan areas and special districts emphasize the need for cooperative arrangement and local flexibility. The state constitution should make possible the solution of new problems without the necessity for specific and detailed constitutional amendments as each case arises.

The Constitution of Texas could be made much more adequate to the exigencies of government and the solution of problems of the latter half of the twentieth century. Revision should be undertaken immediately.

Part Two

County Government

CHAPTER VII

COUNTIES

ARTICLE IX, SECTION 1

The Legislature shall have power to create counties for the convenience of the people subject to the following provisions:

First. In the territory of the state exterior to all counties now existing, no new counties shall be created with a less area than nine hundred square miles, in a square form, unless prevented by pre-existing boundary lines. Should the state lines render this impracticable in border counties, the area may be less. The territory referred to may, at any time, in whole or in part, be divided into counties in advance of population and attached, for judicial and land surveying purposes, to the most convenient organized county or counties.

Second. Within the territory of any county or counties now existing, no new counties shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles. No new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may in whole or in part be taken. Counties of a less area than nine hundred, but of seven hundred or more square miles, within counties now existing, may be created by a two-thirds vote of each house of the Legislature, taken by yeas and nays and entered on the journals. Any county now existing may be reduced to an area of not less than seven hundred square miles by a like two-thirds vote. When any part of a county is stricken off and attached to, or created into another county, the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing, of the county from which it was taken, in such manner as may be prescribed by law.

Third. No part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted, in such manner as may be provided by law, to a vote of the electors of both counties, and shall have received a majority of those voting on the question in each.

History. This section of the Constitution was adopted at the night session of the Constitutional Convention on November 20, 1875, on the sixty-fifth day of the sixty-eighth day convention.¹

¹ S. S. McKay states: "At the night session the article on county and county lands was engrossed, as was also the division of the powers of government, and the article appropriating lands for public buildings. These articles were passed under a suspension

As can be seen, the article gives power to the legislature but imposes specific limitations upon the use of such power. Thus, the legislature is given the power to create counties with a limitation on its power in five areas: (1) the size of the county; (2) planned development of organized and unorganized counties; (3) county seats are to be protected from newly formed counties; (4) debt obligation is to be prorated to new county; and (5) some popular control over the legislature when detaching a part of a county from an older county by requiring an acceptance of a majority of those voting on the question.

The necessity for the adoption of the first section granting power to create counties derives from the nature of a unitary state. Since there is only one unit of government, the central government must control this power either by the exercise of stated power through the legislature as expressed in statutes, or by general laws in the absence of prohibited or stated constitutional powers. Since the written constitution is a well established institution in America, the founding fathers of the Texas Constitution made provisions for both the granting of authority and the restricted use of it through the constitution.

The basic principle of the power to create counties can be found with little modification in all of the state constitutions. The present constitution recognized counties as a legacy, for counties had been established as administrative subdivisions of the Republic of Texas in 1836 and as municipalities under the Mexican Constitution.

The stipulations restricting the legislative power were products of resentment and fear generated by the previous constitution of the Reconstruction Period. The earlier constitutions of Texas had been less restrictive on the legislature and the Constitutional Convention of 1875 was determined to write restrictions of a detailed nature into the constitution.² Since this provision of the constitution remained unchanged for 58 years, it would appear

of the rules, and without debate." Seth Shepard McKay, *Debates in the Texas Constitutional Convention of 1875* (Austin, Texas: University of Texas Press, 1930), p. 445.

² See S. D. Meyers, "Mysticism, Realism, and the Texas Constitution of 1876," *Southwestern Political and Social Science Quarterly*, IX (September, 1928), p. 171; Howard A. Calkins, "The Need for Constitutional Revision in Texas," *Texas Law Review*, XXI (May, 1943), pp. 479-489.

that the constitution makers succeeded in their ambition. In 1933 an amendment to this section was proposed and defeated by a wide margin. However, in 1935, the county home rule provision of Article IX was accepted by the people and became a part of the constitution. This fear of legislative power can be traced from constitution to constitution. For example, the Constitution of 1836 read as follows:

The Republic shall be divided into convenient counties but no new county shall be established, unless it be done on the petition of one hundred free male inhabitants of the territory sought to be laid off and established: and unless the said territory shall contain nine hundred square miles.³

Article VII, Section 34, of the Constitution of Texas, 1847, read as follows:

The Legislature shall at the first session thereof, and may at any subsequent session, establish new counties for the convenience of the inhabitants of such new county or counties. Provided, that no new county shall be established, which shall reduce the county or counties, or either of them, from which it shall be taken, to a less area than nine hundred square miles, (except the county of Bowie), unless by consent of two-thirds of the Legislature; nor shall any county be laid off of less contents. Every new county, as to the right of suffrage and representation, shall be considered as part of the county or counties from which it was taken until entitled by number, to the right of separate representation.

The Constitution of 1866 modified this previous constitutional provision very little. In 1836, the constitution left out the provision relating to Bowie County and added the provision that ". . . all counties heretofore created are hereby declared to be legally constituted counties."⁴ It further stated that no new county could be created when less than one hundred and twenty jurors resided in the proposed county. The Constitution of 1869 left the provisions of the Constitution of 1866 largely intact but increased the number of jurors to one hundred and fifty and further required that in case there be less than one hundred and fifty qualified jurors or other causes which might not allow courts to be held, the district judge was to certify such informa-

³ *Vernon's Annotated Constitution of the State of Texas* (Kansas City, Missouri: Vernon Law Book Company, 1885), Vol. III, p. 523.

⁴ *Constitution of 1847*, Article VII, Section 34.

tion to the Governor and such county would then be attached to the nearest county seat for judicial purposes.⁵

It can readily be seen that each succeeding constitution added further restrictions to the legislative power. The greatest restrictions came in the Constitution of 1876. The new limitations placed on the creation of new counties may be summarized as follows:

- 1) No new counties of less than 900 square miles could be created out of the then unorganized territory and should be square if possible. In border counties the area could be less.
- 2) Counties could be created before the population was sufficient and would then be attached to the most convenient county for judicial and land surveying purposes.
- 3) Counties created within existing counties were not to have less than 700 square miles area, nor could the parent county be reduced below that figure.
- 4) No new county was to approach nearer than twelve miles to the county seat of any county.
- 5) Counties of less than 900 square miles but more than 700 square miles, could be created with a two-thirds vote of the legislature.
- 6) A new county must be held liable for and pay its proportion of all then existing liabilities of the county from which it was taken.
- 7) Any such taking away, or adding to, or creating of new counties must be approved by a majority of the voters voting the question.
- 8) Boundary disputes would be settled by the courts.

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

Similar constitutional provisions are to be found in other American state constitutions. The constitutions of Connecticut, Rhode Island, and Alaska do not provide for counties although some constitutional provisions concern the relationship of towns and boroughs to the central government. The constitutions of Delaware and Maine do not mention counties although these states have counties which are regulated by general statute. Of forty state constitutions examined, only Wisconsin has a higher minimum size requirement for new counties (900 square miles) than Texas. Eleven states prescribe a minimum of 400 square miles.⁶

⁵ *Constitution of 1869*, Article VII, Section 34.

⁶ West Virginia, Indiana, Illinois, Idaho, Maryland, Kentucky, Minnesota, Mississippi, Pennsylvania, Ohio, and Oregon.

Two states, Iowa and Kansas, have established a minimum of 432 square miles, while Arkansas and Virginia require 600 square miles. Three states base the minimum size upon the number of townships to be included.⁷ In addition, there are nine states which set a minimum population which must be attained before a new county may be created.⁸ Wyoming adds a further stipulation requiring a new county to have a total property valuation of two million dollars and the parent county must have three million dollars of property valuation. Idaho, the only other state with such a restriction, requires a property valuation of one million dollars. At least sixteen states require the submission of any proposal to create new counties to a vote of the people concerned.⁹ At least eight of these state constitutions have a direct statement to the effect that the new county be liable for a proportionate share of the liabilities of the parent county at the time of creation.¹⁰

Whereas the Texas Constitution states that the new county line must not pass nearer than twelve miles to the county seat, four states set the minimum at ten miles while California requires only five miles.¹¹ The Constitution of California provides for the merger of a city and a county while the Constitutions of New Mexico and Minnesota state that a city over a certain size may be organized into a separate county.

If the Texas constitutional provisions regarding counties be compared to the provisions of the Model State Constitution, one is struck by the brevity of the latter. Although the grants of power are similar, the power is perhaps more sweeping in the Model State Constitution than in the Texas Constitution. Article VIII, Section 800-806, of the Model State Constitution states:

Provision shall be made by general law for the incorporation of counties, cities, and other civil divisions; and for the alteration

⁷ Michigan requires 16, North and South Dakota both require 24.

⁸ Arkansas, California, Wyoming, Virginia, West Virginia, Maryland, North Dakota, Pennsylvania, and Oregon.

⁹ Arkansas, Colorado, Wisconsin, Wyoming, Virginia, West Virginia, Idaho, Illinois, Kentucky, Minnesota, Mississippi, North Dakota, South Dakota, Ohio, South Carolina, and Utah.

¹⁰ Colorado, California, Wyoming, Florida, Illinois, Idaho, Kentucky, and North Dakota.

¹¹ Arkansas, California, Illinois, Kentucky, and Pennsylvania.

of boundaries, the consolidations of neighboring civil divisions, and the dissolution of any such civil divisions.

Provision shall also be made by general law (which may provide optional plans of organization and government) for the organization and government of counties, cities, and other civil divisions which do not secure locally framed and adopted charters in accordance with the provisions of section 801, but no such law hereafter enacted shall become operative in any county, city, or other civil division until submitted to the qualified voters thereof and approved by a majority of those voting thereon.¹²

Section 1102 of Article XI of the Model State Constitution further allows agreement between a city, county, or other civil division with any other civil division, including the state or the federal government. The Model State Constitution further states that the legislature shall have the power to facilitate such arrangements. Thus, one can see that the Model State Constitution reflects the same distrust of the legislature as did the founding fathers who restricted the power of the legislature after having given to it the necessary power to establish counties.

Interpretations. Since Article IX of the Texas Constitution is rather detailed it would be quite natural to expect that many court decisions have been rendered on these details. It would seem quite logical that as Texas grew and as more counties were established out of the unorganized territory, there would be ample opportunity to test these details. There have been numerous questions before the courts of Texas concerning various points in this section. One only has to look through the section dealing with counties in *Texas Jurisprudence* to see the extent to which this section is now surrounded and supported by court decisions.¹³ A county is a legal subdivision of the state existing for administrative or judicial purposes of the state and, as such, is created to carry out a policy common to the whole state—not to advance the interests of a particular locality.¹⁴ Only the state can raise the question of the legality or validity of the creation of a county.¹⁵ Although the County Commissioners' Court is provided

¹² *Model State Constitution* (New York: National Municipal League—Committee on State Government, 1954), 5th. ed.

¹³ 11 *Texas Jurisprudence* (San Francisco: Bancroft-Whitney Company, 1931), pp. 519-693.

¹⁴ *City of Galveston v. Posnainsky*, 62 Texas 118.

¹⁵ *Blackburn v. Delta County*, 48 Civil Appeals 370; 170 S.W. 80. 11 *Texas Jurisprudence*, Article II, Section 4.

for in the article of the Constitution establishing the judicial system of Texas and, as such, is a part of the judicial system, the County Commissioners' Court is also the legislative body for the county.¹⁶ Some of the Commissioners' Court's power is discretionary while other powers have been held to be mandatory. For example, the powers of "a Commissioners' Court to organize a new county is not one of discretion, but one of jurisdiction, dependent on the presentation of a petition conforming to the statutory requirements."¹⁷ The body is free to hold an election for the organization of a new county at any time other than the general election period if it so chooses.¹⁸ The legislature has complete control over county lines except for constitutional limitations and the county has no vested right in the county boundaries.¹⁹ Although county disputes growing out of boundary problems are to be settled by the district court in an adjoining county not involved in the dispute, counties are acting in good faith to settle the problem out of court.²⁰ The courts have held this settlement to be legally binding, provided the counties did not violate the constitution.²¹ It has also been held that a boundary which has been recognized by the Commissioner of the General Land Office and which has been established and definitely marked between two counties is to be the true boundary, although not mathematically correct.²² However, the courts have been rather strict in applying the twenty-mile limit within which a new county's boundary may approach an existing county boundary.²³ The geographical center of the county is established by certificate of the Land Commissioner issued at the request of the County Judge.²⁴ This is normally done at the time when the county is organized. In 1892, the court held that the stipulation

¹⁶ *Gano v. Palo Pinto County*, 71 Texas 99, 8 S.W. 634; *Bourgeois v. Mills*, 60 Texas 76; *Bradford v. Moseley*, (Comm. App.) 223 S.W. 171; *Navarro County v. Tullis*, (Civ. App.) 237 S.W. 982; *Edmondson v. Cumings* (Civ. App.) 203 S.W. 428; *American Surety Co. v. Hill County*, (Civ. App.) 254 S.W. 241; *Cortyell County v. Burke and Corbett*, (Civ. App.) 4 S.W. 22nd 283.

¹⁷ *Doyle County, Judge et al, v. Slaughter et al*, 250 S.W. 1090.

¹⁸ *State v. Cook et al*, 14 S.W. 996.

¹⁹ 11 Texas Jurisprudence, Article 4, Section 14.

²⁰ *Pecos County v. Brewster County*, (Civ. App.) 250 S.W. 310.

²¹ *Yoakum County v. Gaines County*, 163 S.W. 2d 393 (1942).

²² *Stephens County v. Palo Pinto County*, 155 S.W. 1006.

²³ *Wood et al v. Ball et al*, 166 S.W. 4.

²⁴ 11 Texas Jurisprudence, Article V, Section 25.

regarding pro rata share of liabilities in proportion to the territory taken to the territory left in the county was subordinate to Article VIII, Section 1, requiring uniformity and equality in taxation. The act creating Mills County was therefore unconstitutional since it ignored taxable value of property in Mills County and thereby imposed a different burden for the same purpose on the citizen than he would have to bear if there had been no severance of the county.²⁵

ARTICLE IX, SECTION 2

The Legislature shall pass laws regulating the manner of removing county seats, but no county seat situated within five miles of the geographical centre of the county shall be removed, except by a vote of two-thirds of all the electors voting on the subject. A majority of such electors, however, voting at such election, may remove a county seat from a point more than five miles from the geographical centre of the county to a point within five miles of such centre, in either case the centre to be determined by a certificate from the commissioner of the general land office.

History. A county seat has been defined as "the place where the county business is transacted, the courthouse located and the county court held."²⁶ Until the adoption of the Constitution of 1876 the legislature located the county seats by special acts or by a referendum authorized by the legislature.²⁷ This present limitation upon legislative power was devised to discourage the numerous petitions and elections on the issue of the location of county seats. As early as 1836, the legislature had authorized seats of justice for various counties. In that year, Houston was established as the seat of justice for the County of Harrisburg.²⁸ The following year the legislature authorized the Chief Justice of Brazoria County to issue writs of election to decide whether to leave the seat of justice at Brazoria or to remove it to Columbia.²⁹ In 1838, the legislature authorized the removal of a seat of justice in any county if it was more than five miles from the center of the county and if two-thirds of the qualified voters

²⁵ *Mills County v. Brown County*, 20 S.W. 81 (1892).

²⁶ 11-B *Texas Jurisprudence* (Bancroft-Whitney Company; San Francisco, 1958), rev. p. 20.

²⁷ *Vernon's Texas Constitution*, p. 583.

²⁸ H. P. N. Gammel, ed. *The Laws of Texas, 1822-1897* (Austin, Texas: Gammel Book Company, 1898), Vol. 1, p. 1284.

²⁹ *Ibid.*, p. 1352.

desired its removal. If the seat of justice was within the five mile limit a simple majority of the voters could bring about the removal.³⁰ Since the constitutions of 1845, 1866, and 1869 were silent upon the matter of county seats, the legislature handled this matter either by direct legislation, by the appointment of commissioners to decide sites for a county seat, or by allowing the people to select the commissioners. Under any of these approaches the legislature had the ultimate authority to decide the fate of county seats although the legislature might exercise this power by delegating it to commissioners who were appointed or elected.

The Act of 1838 remained on the statute books without change until June 3, 1873. An amendment passed in that year by the legislature provided that a mere majority of electors was sufficient for removal of a seat of justice and that it was the duty of the county court to order an election for the removal of a county seat.³¹ In 1874, the legislature provided that in any county without a county seat, the Governor was authorized, upon proper representation being made of him of such fact, to select a temporary county seat for such county, and after such selection, courts would remain there until a permanent location was decided upon as provided by law. It further required the Governor to provide for a permanent selection one month after the temporary selection had been made.³²

This limitation on the legislature's power to remove county seats is not duplicated in the present constitution, although Article III, Section 56, acts as a limitation upon the legislature's power to pass any local or special laws and simply acts as another prohibition to anchor this limitation. Article III, Section 56, reads in part: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing . . . locating or changing county seats. . . ."

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

Such limitations upon the legislature are fairly common in the constitutions of the states. At least thirteen of these constitutions

³⁰ *Ibid.*, pp. 1474-75.

³¹ *Ibid.*, Vol. VII, pp. 646-47.

³² *Ibid.*, Vol. VIII, p. 181.

limit the rights of the legislature to remove the county seats.³³

The Model State Constitution says nothing about county seats. Article VIII, Section 802, suggests that counties have the power as provided by general or optional law. It also provides for local referendum and approval of a majority of qualified voters.³⁴ Evidently, this provision is considered sufficient authorization for a county to handle its own problems in connection with locating county seats.

Interpretations. The determination of the county seat is first done by an election. When a county is first organized an election is held to fix the location of the county seat. The place receiving a majority of all the votes becomes the county seat.³⁵ The courts of the state have jurisdiction to try contests of elections held to determine the location of county seats. When the court finds that a certain place has been chosen as the county seat, it declares that place to be the county seat. When it appears that at an election a certain place was chosen as the county seat, and that place has been recognized as the county seat for a long period of years, the inference is that the county seat was legally established at that place.³⁶ Although the legislature has no power to pass local or special laws locating or changing county seats, it may validate irregularly created county seats by general laws.³⁷ Once an election for the location or removal of a county seat has been held, a subsequent election for the same purpose cannot be held within a ten-year period unless such election is to secure the removal of the county seat from a location more than five miles from a railroad to a point on the railroad. In such a case, this election may be held within a two-year period.³⁸

ARTICLE IX, SECTION 3*

(1) Holding the belief that the highest degree of local self government which is consistent with the efficient conduct of those affairs by necessity lodged in the nation and the state will prove

³³ Arkansas, California, Colorado, Idaho, Illinois, Kansas, Kentucky, Mississippi, Michigan, Minnesota, New Mexico, Utah, and Tennessee.

³⁴ *Model State Constitution*, Article VIII, Section 802.

³⁵ *11-B Texas Jurisprudence*, p. 20.

³⁶ *Ibid.*, p. 21.

³⁷ *Loc. cit.*, also, Article IX, Section 2.

³⁸ *Ibid.*, p. 24; from RS Article 1601.

* Popularly known as "the county home rule amendment."

most responsive to the will of the people, and result to reward their diligence and intelligence by greater economy and efficiency in their local governmental affairs, it hereby is ordained:

(2) Any county having a population of sixty-two thousand (62,000) or more according to the then last federal census may adopt a County Home Rule Charter, to embrace those powers appropriate hereto, within the specific limitations hereinafter provided. It further is provided that the Legislature, by a favoring vote of two-thirds of the total membership of both the Senate and the House of Representatives, may authorize any county, having a population less than that above specified, to proceed hereunder for the adoption of a charter; however, as a condition for such authorization, it is required that notice of the intent to seek legislative authority hereunder must be published in one or more newspapers, to give general circulation in the county affected, not less than once per week for four (4) consecutive weeks, and the first of such publications shall appear not less than thirty (30) days next prior to the time an act making proposal hereunder may be introduced in the Legislature. No county home rule charter may be adopted by any county save upon a favoring vote of the resident qualified electors of the affected county. In elections submitting to the voters a proposal to adopt a charter (unless otherwise provided by a two-thirds vote of the total membership of each house of the Legislature) the votes cast by the qualified electors residing within the limits of all the incorporated cities and towns of the county shall be separately kept but collectively counted and the votes of the qualified electors of the county who do not reside within the limits of any incorporated city or town likewise shall be separately kept and separately counted. And unless there be a favoring majority of the votes cast within and a favoring majority of the votes cast without such collective cities and towns, the charter shall not be adopted. It is expressly forbidden that any such charter may inconsonantly affect the operation of the general laws of the state relating to the judicial, tax, fiscal, educational, police, highway and health system, or any other department of the state's superior government. Nothing herein contained shall be deemed to authorize the adoption of a charter provision inimical to or inconsistent with the sovereignty and established public policies of this state, and no provision having such vice shall have validity as against the state. No charter provision may operate to impair the exemption of homesteads as established by this constitution and the statutes relating thereto.

(3) a. A charter hereunder may provide: The continuance of a County Commissioners' Court, as now constituted, to serve as the governing body of a county to operate hereunder; or, may provide for a governing body otherwise constituted, which shall be elected, and service therein shall be upon such qualifications, for such terms, under such plan of representation, and upon such conditions of tenure and compensation as may be fixed by any such

charter. The terms for service in such governing body may exceed two (2) years, but shall not exceed six (6) years. In any event, in addition to the powers and duties provided by any such charter, such governing body shall exercise all powers, and discharge all duties which, in the absence of the provisions hereof, would devolve by law on County Commissioners and Commissioners' Courts. Further, any such charter may provide for the organization, reorganization, establishment and administration of the government of the county, including the control and regulation of the performance of and the compensation for all duties required in the conduct of the county affairs, subject to the limitations herein provided.

b. A charter hereunder may provide that judges of county courts (including that county court designated in this constitution), and Justices of the Peace be compensated upon a salary basis in lieu of fees. The jurisdiction of the County Court designated in this constitution, and the duties of the judges thereof, may be confined to that general jurisdiction of a probate court which elsewhere is defined in this constitution. The office of Justice of the Peace may be made either elective or appointive. Other than as herein provided, no such charter shall provide for altering the jurisdiction or procedure of any court. The duties of District Attorney and/or County Attorney may be confined to representing the State in civil cases to which the State is a party and to the enforcement of the State's penal code, and the compensation of said attorneys may be fixed on a salary basis in lieu of fees.

c. Save as herein above and hereinafter otherwise provided, such charters, within the limits expressed therein, may invest the governing body to be established for any county electing to operate hereunder with the power to create, consolidate or abolish any office or department, whether created by other provisions of the constitutions or by statute, define the duties thereof, fix the compensation for service therein, make the same elective or appointive and prescribe the time, qualifications and conditions for tenure in any such office; save, that no such charter other than as herein before authorized, shall provide to regulate the status, service, duties or compensation of members of the legislature, judges of the courts, district attorneys, county attorneys, or any office whatever by the law of the state required to be filled by an election embracing more than one county. Excepting herefrom nominations, elections or appointments to office, the terms whereof may not have expired prior to the adoption of this amendment to the constitution, at such time as a charter provision adopted hereunder may be in effect (save as to those offices which must continue to be elective, as herein elsewhere specified), all terms of county officers and all contracts for the giving of service by deputies under such officers, may be subject to termination by the administrative body of the county, under an adopting charter so providing, and there shall be no liability by reason thereof.

d. Any county electing to operate hereunder shall have the power,

by charter provision, to levy, assess and collect taxes, and to fix the maximum rate for ad valorem taxes to be levied for specific purposes, in accordance with the constitution and laws of this state, provided, however, that the limit of the aggregate taxes which may be levied, assessed and collected hereunder shall not exceed the limit or the total fixed, or hereafter to be fixed, by this constitution to control counties, and the annual assessment upon property, both real, personal and mixed, shall be a first superior and prior lien thereon.

e. In addition to the powers herein provided, and in addition to powers included in county home rule charters, any county may, by a majority vote of the qualified electors of said county, amend its charter to include other powers, functions, duties or rights which now or hereafter may be provided by this constitution and the statutes of the state for counties.

(4). Any county operating hereunder shall have the power to borrow money for all purposes lawful under its charter, to include the refunding of a lawful debt, in a manner conforming to the general laws of the state, and may issue therefor its obligations. Such obligations, other than those to refund a lawful debt, shall not be valid unless authorized by a majority of all votes cast by those resident qualified voters of the area affected by the taxes required to retire such obligations, who may vote thereon. In case of county obligations, maturing after a period of five (5) years, the same shall be issued to mature serially, fixing the first maturity of principal at a time not to exceed two (2) years next after the date of the issuance of such obligations. Such obligations may pledge the full faith and credit of the county; but in no event shall the aggregate obligations so issued, in principal amount outstanding at any one time, exceed the then existing constitutional limits for such obligations and such indebtedness and its supporting tax shall constitute a first and superior lien upon the property taxable in such county. No obligation issued hereunder shall be valid unless prior to the time of the issuance thereof there be levied a tax sufficient to retire the same as it matures, which tax shall not exceed the then existing constitutional limits.

(5) Such charter may authorize the governing body of a county operating hereunder to prescribe the schedule of fees to be charged by the officers of the county for specified service, to be in lieu of the schedule for such fees prescribed by the general laws of the state; and, to appropriate such fees to such funds as the charter may prescribe; provided, however, no fee for a specified service shall exceed in amount the fee fixed by general law for that same service. Such charters as to all judicial officers, other than district judges, may prescribe the qualifications for services, provided the standards therefor be not lower than those fixed by the general laws of the state.

(6) a. Subject to the express limitations upon the exercise of the powers by this subdivision to be authorized, such charters may

provide (or omit to provide) that the governmental and/or proprietary functions of any city, town, district or other defined political subdivision (which is a governmental agency and embraced within the boundaries of a county) be transferred, either as to some or all of the functions thereof, and yielded to the control of the administrative body of the county. No such transfer or yielding of functions may be effected, unless the proposal is submitted to a vote of the people, and, unless otherwise provided by a two-thirds vote of the total membership of each house of the legislature, such a proposal shall be submitted as a separate issue, and the vote within and without any such city, town, district, or other defined governmental entity, shall be separately cast and counted, and unless two-thirds of the qualified votes cast within the yielding defined governmental entity and a majority of the qualified votes cast in the remainder of the county, favor the proposed merger, it shall not be effected. In case of the mergers hereby authorized, without expressed charter provision therefor, insofar as may be required to make effective the object of the proposed merger, the county shall succeed to all the appropriate lawful powers, duties, rights, procedures, restrictions and limitations which prior to the merger were reposed in, or imposed upon, the yielding governmental agency. Particularly, it is provided that the power to create funded indebtedness and levy taxes in support thereof may be exercised only by such procedures, and within such limits, as are now, or hereafter may be, provided by law to control such appropriate other governmental agencies were they to be independently administered. Such mergers may be effected under proposed contract between the county and any such yielding governmental agency, to be approved at an election as herein before provided for. In order to increase governmental efficiency and effect economy the county may contract with the principal city of the county to perform one or more of its functions. Provided such contracts shall not be valid for more than two (2) years.

b. In case of the partial or complete merger of the government of a city operating under a home rule charter, with the government of a county operating hereunder, those city charter provisions affected thereby shall cease to control, and the county charter provisions shall control.

c. When any embraced incorporated city or town elects to merge its governmental functions with those of the county under the provisions hereof, such charter may provide for defining or redefining the boundaries of such cities and towns, provided, however, that in defining or redefining the boundaries of such cities and towns, such boundaries may be extended only to include those areas contiguous to such cities as are urban in character; and as to such cities or towns and for the benefit thereof the county, in addition to the primary city and county tax herein authorized and any other lawful district tax, may levy and collect taxes upon the property taxable within such city or town as defined or redefined, within the limits

authorized by sections 4 and 5 of Article XI of this constitution, (or any amendment thereof), for incorporated cities according to the population, provided that no tax greater than that existing at the time of such merger or for any added purpose shall be imposed upon any such city or town unless authorized by a majority of all votes cast by the resident qualified voters of such city or town.

d. Areas urban in character though not incorporated, under appropriate charter provision may be defined as such by the governing body of the county, provided, however, that no portion of the county shall be defined as an urban area unless it has sufficient population to entitle it to incorporate under the then existing laws of the state; and no such urban area, when created, shall be vested with any taxing or bonding power which it would not possess if it were operated as a separate incorporated unit under the then existing constitutional and statutory provisions of this state; and provided further that the governing body of the county for the government of such areas shall have and exercise all powers and authority granted by law to the governing bodies of similar areas when separately incorporated as a city or town, and such areas shall be subject to additional taxation within the same constitutional limits as control taxation for a city or a town of like population. Likewise such charter may provide for the governing board of the county subject to existing constitutional and statutory provisions to define, create and administer districts, and have and exercise the powers and authority granted by the constitution and laws relative to the same.

(7) No provision of this constitution inconsonant with the provisions of this Section 3, of Article IX, shall be held to control the provisions of a charter adopted hereunder, and conforming herewith. Charters adopted hereunder shall make appropriate provision for the abandonment, revocation, and amendment thereof, subject only to the requirements that there must be a favoring majority of the vote cast upon such a proposal, by the qualified resident electors of the county; and, no charter may forbid amendments thereof for a time greater than two (2) years. The provisions hereof shall be self-executing, subject only to the duty of the legislature to pass all laws (consistent herewith) which may be necessary to carry out the intent and purpose hereof. Further, the legislature shall prescribe a procedure for submitting to decision, by a majority vote of the electors voting thereon, proposed alternate and elective charter provisions. Added Aug. 26, 1933.

History. The home rule amendment to Article IX was adopted in August 1933, after having been proposed by two-thirds of the legislature under Senate Bill 70. The nation was in the depths of the depression and the people and the legislature were looking for reasonable means to cut the cost of government. Much was

written at this time by political scientists and students of government regarding the conditions of the county system and possible ways of improving this area of government. Since 1911, when California adopted a county home rule amendment, there had been growing sentiment for such provisions in other state constitutions. Even today, county home rule remains one of the guiding principles advocated by many teachers and researchers in the local government field. Missouri, in 1945, and Washington, in 1948, are two of the most recent instances where the states have adopted some form of home rule provisions for county government.

The advocates of such form of government generally give their arguments for home rule as follows: home rule helps to create local interest and responsibility; it allows for a more flexible governmental structure and relationship with the state; home rule would allow the county to employ more capable men to run the county, such as a county manager; it would free the legislature from having to pass on detailed bills for the counties; and, home rule would save money. With the growth of cities and the governmental problems created by the large metropolitan areas operating within the county and sometimes displacing the county as a separate geographical entity, it would not seem unlikely that such economies could be made by simply combining the two agents of government into one, thus eliminating some of the duplication of functions of the city and counties.

This amendment marks the first time in the history of Texas that county home rule has been attempted. No previous constitution for the state contained such provisions. This part of the organic law came through the amendment process and, if taken literally, would signalize a change in the traditional attitude of the state regarding the county. Professor Claunch maintains that "there are so many restrictions and limitations in the Texas county home rule amendment and the enabling act that it would perhaps be more accurate to say that Texas has not authorized county home rule."³⁹

Article IX, Section 3, briefly stated, was designed to accomplish

³⁹ *The Government of Dallas County, Texas* (Dallas, Southern Methodist University Press, 1954), p. 197.

the following: to stimulate the highest degree of local self-government; to provide two ways in which this might be stimulated, either by allowing counties of over 62,000 population to draft charters for home rule, or by bestowing this home rule upon counties of less than the prescribed population by a two-thirds vote of the legislature; to give the county an optional form of the governing body rather than the Commissioners' Court; to allow the county to create, abolish or consolidate offices and functions other than Judges of the Courts, District Attorneys, County Attorneys, or "any office whatever by the law of the state required to be filled by an election embracing more than one county,"⁴⁰ and, to allow for transferring the functions, governmental or proprietary, of any city, town, district, or other defined subdivision which is within the county, to the county government.

Interpretation. From time to time some interest has been evident to frame a charter for county home rule purposes. None of these efforts have been successful. The amendment requires a procedure which almost precludes its adoption for there must be approval in both the incorporated and unincorporated areas.⁴¹ Although having a much smaller total population than that in the incorporated areas, the unincorporated area could veto the project. This has been the case in El Paso where the proposed charter was accepted in the city but failed in the outside areas.⁴² The clash has not been resolved between the urban dwellers and the farmers who normally look upon the county as their government and who seem to be determined not to let the city control the county government any more than is necessary. It would appear that the legislature recognized this difference and simply preserved it in form of this amendment. However, the sentiment for a county home rule charter is not always found in the larger metropolitan counties.

⁴⁰ *Texas State Constitution*, Article IX, Section 3c.

⁴¹ *Ibid.*, Article IX, Section 3, paragraph 2.

⁴² According to W. E. Benton, "The County Home Rule Movement in Texas," *Southwestern Social Science Quarterly*, Vol. XXI (September, 1950), the vote was as follows: Within the city the charter carried narrowly by the 3,309 for to 2,166 against. Outside the city only 791 votes favored the charter while 1,609 were against the adoption of the charter. The total support, then, was 4,070 for to 3,775 against the charter.

In 1947, Delta County successfully gained the necessary two-thirds vote of both houses of the legislature which enabled Delta County to draw up a proposed charter. The charter was given to the Attorney General of the State of Texas for an opinion regarding the constitutionality of certain passages of the charter which consolidated the offices of the county manager with those of the County Tax Assessor and Collector.⁴³ The Attorney General ruled the proposed charter invalid. In his opinion he stated:

The Manager provided in such a Charter may not be authorized to appoint and remove subordinate officers, as such authority would be an unlawful delegation of power by the governing body.

The Charter may not abolish the offices of County Tax Assessor and Collector, District Clerk, Sheriff, Justice of the Peace, Constable, or the Commissioners' Court, since each of these is a state functionary exercising powers and charged with duties of state wide importance as contradistinguished from county affairs; and such abolishment would be contrary to the express prohibition of the amendment.⁴⁴

As Mr. Benton has pointed out, "since county officers are covered by constitutional provisions as well as by general laws, it would be difficult, if not impossible, to draft a valid charter under the amendment providing for any extensive county reorganization."⁴⁵ Before such charters could become truly effective and achieve the goals which the home rule supporters have in mind, it would appear that such authority in the form of amendment must give the county and the legislature broad and sweeping powers to overcome contradictory statements in the present constitution. There seems to be little prospect of this occurring under the present circumstances. However, the trend has been in this direction. Rhode Island and Connecticut have abolished counties and Alaska did not provide for their creation in its recent constitution. As already mentioned, the Model State Constitution provides for fluid adjustment between the various ideas and subdivisions of the state.

⁴³ For a complete discussion of this charter and its scope and power, no better article exists than the one previously cited which Mr. Benton contributed to the *Southwestern Social Science Quarterly*. In point of fact, this seems, indeed, to be the only article written involving this matter.

⁴⁴ *Attorney General of Texas, Digest of Opinions*, 1948, To R. S. C. Ratliff, County Attorney, Delta County, V-723.

⁴⁵ Benton, *op. cit.*, p. 115.

COUNTY-WIDE HOSPITALS

ARTICLE IX, SECTIONS 4 AND 5

Section 4. COUNTY-WIDE HOSPITAL DISTRICTS IN CERTAIN COUNTIES.—The Legislature may by law authorize the creation of county-wide Hospital Districts in counties having a population in excess of 190,000 and in Galveston County, with power to issue bonds for the purchase, acquisition, construction, maintenance and operation of any county-owned hospital, or where the hospital system is jointly operated by a county and city within the county, and to provide for the transfer to the county-wide Hospital District of the title to any land, building or equipment, jointly or separately owned, and for the assumption by the district of any outstanding bonded indebtedness thereto issued by any county or city for the establishment of hospitals or hospital facilities; to levy a tax not to exceed Seventy-five (\$.75) Cents on the One Hundred (\$100.00) Dollars valuation of all taxable property within such district, provided, however, that such district shall be approved at an election held for that purpose, and that only qualified, property-taxpaying voters in such county shall vote therein; provided further, that such Hospital District shall assume full responsibility for providing medical and hospital care to needy inhabitants of the county, and thereafter such county and cities therein shall not levy any other tax for hospital purposes; and provided further that should such Hospital District construct, maintain and support a hospital or hospital system, that the same shall never become a charge against the State of Texas, nor shall any direct appropriation ever be made by the Legislature for the construction, maintenance or improvement of the said hospital or hospitals. Should the Legislature enact laws in anticipation of the adoption of this amendment, such Acts shall not be invalid because of their anticipatory character. (Sec. 4, Art. 9, adopted November 2, 1954).

Section 5. AUTHORIZING CREATION OF HOSPITAL DISTRICTS IN POTTER, WICHITA, AND JEFFERSON COUNTIES

Section 5-a. The Legislature may by law authorize the creation of two hospital districts, one to be coextensive with and have the same boundaries as the incorporated City of Amarillo, as such boundaries now exist or as they may hereafter be lawfully extended, and the other to be coextensive with Wichita County.

If such district or districts are created, they may be authorized to levy a tax not to exceed Seventy-five Cents (\$.75) on the One Hundred Dollars (\$100.00) valuation of taxable property within the district; provided, however, no tax may be levied until approved by a majority vote of the participating resident qualified property taxpaying voters who have duly rendered their property for taxation. The maximum rate of tax may be changed at subse-

quent elections so long as obligations are not impaired, and not to exceed the maximum limit of Seventy-five Cents (\$.75) per One Hundred Dollars (\$100.00) valuation, and no election shall be required by subsequent changes in the boundaries of the City of Amarillo.

If such tax is authorized, no political subdivision or municipality within or having the same boundaries as the district may levy a tax for medical or hospital care for needy individuals, nor shall they maintain or erect hospital facilities, but the district shall by resolution assume all such responsibilities and shall assume all the liabilities and obligations (including bonds and warrants) of such subdivisions or municipalities or both. The maximum tax rate submitted shall be sufficient to discharge such obligations, liabilities, and responsibilities, and to maintain and operate the hospital system and the Legislature may authorize the district to issue tax bonds for the purpose of the purchase, construction, acquisition, repair or renovation of improvements and initially equipping the same, and such bonds shall be payable from said Seventy-five Cents (\$.75) tax. The Legislature shall provide for transfer of title or properties to the district.

b. The Legislature may by law permit the County of Potter (in which the City of Amarillo is partially located) to render financial aid to that district by paying a part of the expenses of operating and maintaining the system and paying a part of the debts of the district (whether assumed or created by the district) and many authorize the levy of a tax not to exceed Ten Cents (\$.10) per One Hundred Dollars (\$100.00) valuation (in addition to other taxes permitted by this Constitution) upon all property within the county but without the City of Amarillo at the time such levy is made for such purposes. If such tax is authorized, the district shall by resolution assume the responsibilities, obligations, and liabilities of the county in the manner and to the extent hereinabove provided for political subdivisions having boundaries co-extensive with the district, and the county shall not thereafter levy taxes (other than herein provided) for hospital purposes nor for providing hospital care for needy individuals of the county.

c. The Legislature may by law authorize the creation of a hospital district within Jefferson County, the boundaries of which shall include only the area comprising the Jefferson County Drainage District No. 7 and the Port Arthur Independent School District, as such boundaries existed on the first day of January, 1957, with the power to issue bonds for the sole purpose of purchasing a site for, and the construction and initial equipping of, a hospital system, and with the power to levy a tax of not to exceed Seventy-five Cents (\$.75) on the One Hundred Dollars (\$100.00) valuation of property therein for the purpose of paying the principal and interest on such bonds.

The creation of such hospital district shall not be final until

approved at an election by a majority of the resident property taxpaying voters at said election who have duly rendered their property for taxation upon the tax rolls of either said Drainage or said School District, nor shall such bonds be issued or such tax be levied until so approved by such voters.

The district shall not have the power to levy any tax for maintenance or operation of the hospital or facilities, but shall contract with other political subdivisions of the state or private individuals, associations, or corporations for such purposes.

If the district hereinabove authorized is finally created, no other hospital district may be created embracing any part of the territory within its boundaries, but the Legislature by law may authorize the creation of a hospital district incorporating therein the remainder of Jefferson County, having the powers and duties and with the limitations presently provided by Article IX, Section 4, of the Constitution of Texas, except that such district shall be confirmed at an election wherein the resident qualified property taxpaying voters who have duly rendered their property within such proposed district for taxation on the county rolls, shall be authorized to vote. A majority of those participating in the election voting in favor of the district shall be necessary for its confirmation and for bonds to be issued.

d. Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be invalid because of their anticipatory character. (Sec. 5, Art. 9 adopted November 4, 1958.)

History. When such districts are created by constitutional amendment, these districts, in effect, become special districts established under special grants of power by the constitution and possessing their own taxing power. Under this amendment the Legislature of Texas, in 1953, enacted laws providing for the various bodies which would govern these districts. The governing body in those counties of less than 800,000 population consists of a board of hospitals managers appointed by the commissioners' court. In those counties having more than 800,000 population a special advisory board, composed of the mayors of all of the incorporated cities of the county, appoints three members of a seven-member board while the commissioners' court appoints the other three members and these six members choose a seventh member.⁴⁶ There are two ways in which the election for the district may be initiated: first, by the action of the com-

⁴⁶ *Vernon's Constitution of the State of Texas, Annotated* (Kansas City, Mo.: Vernon Law Book Company, 1955), Vol. 2, p. 597.

missioners' court or, second, upon initiation of one-hundred qualified taxpayers of the county.

No previous constitution of Texas allowed for similar districts. In the Constitution of Texas, 1866, Article X, Section 9, provision was made to use the four hundred thousand acres of land set apart for the use of asylums for the deaf and dumb, the blind, the orphaned, and those classified as lunatics.

The basic objections to the adoption of these amendments were: one, such districts would further complicate the local governmental structure; two, such districts were independent of the existing units of local government; three, the creation of such districts would let the floodgates down and this would be the first of many such specially created hospital districts. This last objection seems to be especially valid, for in 1958 an amendment was passed to allow the City of Amarillo, Wichita County, and Jefferson County to create special county-wide hospitals, and in 1960 the people of Texas also approved amendments to allow Lamar County, Hildago County, and the County Commissioners' Precinct 4 of Comanche County to create such special districts. The proliferation of special districts has started and the tendency is that it will become worse unless it is halted. "Special districts have been increasing steadily during the 15-year period from 1942 to 1957, and during the last 5 years they have grown in number by 17 per cent."⁴⁷ In 1957, Texas had 645 such special districts.

One further objection which involves the nature of this amendment might be mentioned. This is basically legislative detail which is made into constitutional provision. True, it may be considered necessary in order to circumvent the constitutional stipulation in Article XI, Section 3, of the present constitution which prohibits any county, city, or other municipal corporation from becoming a subscriber to the capital stock of any corporation or association, or to make appropriation or donation to it or to loan it credit. But this stipulation, too, was legislative detail *and now we have amendments of legislative detail amending stipulations of legislative detail.*

⁴⁷ Department of Commerce, Bureau of the Census, *Governments of the United States; 1957 Census of Governments* (Washington, D. C.; 1957), Vol. 1, No. 1, p. 6.

COMPARABLE PROVISIONS IN OTHER STATE CONSTITUTIONS

No comparable provision in other state constitutions could be found. Most acts are passed by the legislatures of the states and evidently do not need constitutional provisions such as the foregoing, for the power is already given to the legislature to act on such matters. The question involved is not the desirability of the creation of such hospital districts but whether or not such creation should be a matter of constitutional concern. Most states seem to leave such action to the discretion of the legislature.

The Model State Constitution makes provision for such special districts but places the burden of creation for them upon the legislature through its statutes and general laws. Provision is made for freedom of contractual agreement between cities and county or counties and this is left up to the respective bodies. Since it appears that special districts will continue to play an important role in local and state administration it might be wise for provisions to be made by legislative enactment based upon a general grant of power in the constitution rather than upon many specific provisions written into and adopted as amendments of the constitution as the needs arise.

Suggested Revision. These provisions, as well as the recent amendments to the constitution adopted in the fall of 1960, be stricken from the constitution and that if such authorization is needed to overcome the limitations of Article XI, Section 3, this authorization be written in terms of a general grant of authority to the legislature for it to use as needs arise.

Conclusions and Recommendations. The basic criticism of the county system in Texas may be stated briefly. Texas has never really determined the basic functions of its counties. Since Texas' inception as a nation and later as a state, the county has been viewed as a municipal corporation, a representative district, an election unit, a unit for judicial purposes, an administrative subdivision of the state, a fiscal unit of the state, and a political unit of the state.

As is known, the county system was an importation of the English system of government. When the king was the sole preserver of peace and order he found that the duties of office

could not be rendered simply by him and so he selected certain officers to help in the preservation of order, the dispensation of justice, and the collection of revenue. The sheriff, or the reeve of the shire, was the first and oldest officer of the county, and his duties included both the preservation of peace and order and the collection of taxes for the king's government. This vestige of English practice is still seen in Texas where, in counties of less than 10,000 population, the sheriff still acts as tax assessor and collector.⁴⁸

The historical evolution of the county system in Texas has been somewhat different from that of other states. Louisiana bears the imprint of the Napoleonic Code. The southwestern states bear the imprint of the Mexican influences. The evolution of the county system in Texas bears both the English and the Mexican influence.

When Texas was a part of Mexico no subdivisions similar to counties was recognized by the Mexican government. Whenever it became necessary to divide the geographical areas into manageable size for administrative purposes, such divisions were recognized as municipalities. The term municipality was applied not only to the "four leagues granted to the central town, but the whole of the district of the county of which the town was capital."⁴⁹ This municipality was the basic unit of government under Mexican rule. This unit was governed by a council, or *ayuntamiento*.⁵⁰ It was from these municipalities "that the delegates were sent, on the call of a citizens' meeting in Columbia, to the Consultation in 1835 at San Felipe."⁵¹ These municipalities became the basic unity of representation for the General Council and the Convention. Under the Republic these municipalities became the county units. The Constitution of the Republic of Texas altered the municipal structure somewhat to provide electoral districts for the election of congressmen and these districts were referred to as precincts rather than counties.⁵²

⁴⁸ *Texas State Constitution*, Article VIII, Section 16.

⁴⁹ *City of Victoria v. Victoria County*, 94 S.W. 368 (1906).

⁵⁰ For a full discussion on the early county system see Seymour v. Conner, "The Evolution of County Government in the Republic of Texas," *The Southwestern Historical Quarterly*, Vol. LV, No. 2 (October, 1951).

⁵¹ *Ibid.*, p. 165.

⁵² *Ibid.*, p. 171.

Thus, quite early in the history of Texas the counties became identified with the electoral process and were looked upon as areas of representation. Since the conventions which declared independence and established the constitution were staffed by representatives for the municipalities, it was logical that these men simply carry this system into law as a basis of representation for the Congress of the Republic. The counties of Texas are still looked upon as part of the electoral process, for it is the county judge who issues writs of election and the party system is based upon the county structure. Texas, then, has 254 county divisions of the democratic party, and at state conventions this grouping is carried over into senatorial districts for representation on the State Executive Committee which acts as a link between the Governor, who is considered to be the head of the ruling party, and the party in each of the counties.

Because of this connection between the existence of a county and representation, one of the basic problems of the Congress of the Republic was the admission of new counties. Congress could establish new counties and "each new county was entitled to at least one representative in Congress."⁵³ Since there existed a large and unorganized western area which would then gain representation as it was occupied and organized, this problem of representation of newly organized counties soon became critical because thirty-two of the allowed forty representatives had been given to the original twenty-three counties. As each new county was organized the number of available representatives was diminished until, by 1839, the eight newly created counties had absorbed all of the available representatives.⁵⁴ Any further organization of unorganized territory into counties would necessitate reapportionment of representation with its accompanying reduction of representation—a prospect as distasteful then as it seems to be now. Congress tried to circumvent this problem by creating judicial districts such as the Northern Division of Liberty County. Under this guise of organization of governmental structure without representation six new counties were created while

⁵³ *Ibid.*, p. 181, as quoted from Gammel, *The Laws of Texas*, Vol. I, p. 1069.

⁵⁴ *Ibid.*, p. 182.

fifteen judicial districts were created.⁵⁵ In 1842 the Supreme Court declared judicial counties to be unconstitutional and, in 1845, the Ninth Congress nullified all previously created judicial districts where courts were allowed to be held in more than one place in the county.⁵⁶ The only solution left was an amendment to the constitution. Before this could be done, *the State of Texas* adopted a new constitution which provided for the creation of counties without granting automatic representation. Thus, by the time Texas came into the Union the county had been viewed in three ways. First, it had been viewed as a municipality; second, as a judicial unit of the state; and third, as a basis for representation. All three of these views are still seen in the present constitution. The organization of the county is mentioned under the judicial article of the constitution. The municipal concept is expressed in Article XI of the constitution.

It is the multipurpose aspect of county government which, probably more than anything else, could be corrected in a new constitution. There are many references to the counties which show up throughout the Constitution and the limitations and powers of the county are nowhere found in a single section. Article IX of the constitution, which is entitled "Counties," provides only a small look at the powers and limitations of the counties. These powers could be consolidated into one general provision of the constitution setting forth how counties are to be created, their powers, and their governmental organization and structure, as well as the limitations upon the counties.

A new constitution must decide whether it wishes to treat power, restrictions, and functions as a separate part of the constitution or whether it wishes to treat structures and subdivisions as grounds for making a provision of the constitution. As of now, the present constitution does both. The idea of tax and the limitations of taxing power are treated in one article and then the counties and cities are treated in separate articles.

As the constitutional provisions stand today, there is really little justification for the existence of Article IX entitled "Coun-

⁵⁵ *Ibid.*, p. 183.

⁵⁶ *Ibid.*, p. 184.

ties." Without some restriction to the contrary the legislature would have the power to create new counties. The first part of Article IX is really a limitation upon the legislature. This article restricted the area and size of newly organized counties. It further limited the location of county seats by stating that the new county could not approach closer than twelve miles to the existing counties.

The twelve-mile limitation, as well as the restriction demanding that county seats be located within a five mile radius of the geographical center of the county, reflects the necessities of 1876 rather than those of today. When transportation facilities were built around the horse, the county seat perhaps should have been somewhat accessible to those residents of the extreme corners of the county, but with modern transportation facilities, there seems little reason for this provision. Most of the county seats are now firmly established although it is conceivable that a small group in a non-county seat city or town would like to promote a move to their town in hopes of increasing business or the like. The legislature could be given power, if it does not have it already, to enact a general law that would protect the existing county seats and discourage such promotional attempts. However, it is entirely possible that some county seats should be moved. In some areas the county seats provide a major attraction to the town and hence become an integral part of the economy. Other county seats could do without this attraction. However, the question of location of the county seat should not be determined by economic factors.

The automobile has also given us a way to consolidate geographical divisions. The small divisions of counties which were established as Texas grew made sense for the residents of those days. Since counties were organized for the convenience of the citizens, it would not seem logical that their size would work as an inconvenience. However, today the smallness and the number of counties might be considered an inconvenience. Many students of government now advocate consolidation of existing counties. This is one aspect which should be thoroughly considered in the new constitution.

CHAPTER VIII

ADMINISTRATIVE ORGANIZATION AND STRUCTURE

THE COUNTY COMMISSIONERS' COURT

ARTICLE V, SECTION 1

The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in district Courts, in County Courts, in Commissioners Courts, in Courts of justices of the peace, and in such other courts as may be provided by law.

The criminal district court of Galveston and Harris Counties shall continue with the district jurisdiction and organization now existing by law until otherwise provided by law. The legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto. (Section 1, amended and adopted, August 11, 1891).

History. The County Commissioners' Court is the administrative and legislative body of the county in Texas. Its immediate predecessors, like the county judge, can be traced to both the Mexican rule and the English heritage. More directly, the County Commissioners' Court belongs to the Mexican rule for it was during the time of Spanish-Mexican rule that the departments and municipalities were created. The ruling agency was *ayuntamiento* composed of *alcades*, *regidores*, and *syndics*. This was presided over by a judge elected from this body by the municipal assembly. In 1836, Congress passed a law organizing the ruling body of the counties and called for the election by Congress of a Chief Justice in each county together with two Associate Justices who were elected by the Justices of the Peace in each county.⁵⁷ This trio acted as the governing body of the county and "was responsible for the superintendence and control of public roads, bridges and ferries, and for the care of the indigent,

⁵⁷ "There shall be established in the several counties of this Republic an inferior court of law, which shall be styled the county court of the County of _____; to be composed of one Chief Justice, who shall be elected by joint ballot of both Houses of Congress, and shall hold his office for a period of four years, and two Associate Justices, who shall be elected by a majority of the Justices of the Peace of each county from among their own body at the beginning of each and every year; and the Justices so selected shall attend said County Court or pay a fine assessed by the Chief Justice not exceeding one hundred dollars." H.P.N. Gammel, *The Laws of Texas* (Austin: The Gammel Book Co., 1898), Vol. 1., pp. 1822-38, entitled "An Act Organizing the Inferior Courts and Defining The Powers and Jurisdiction of the Same," passed December 20, 1836.

lame, blind, and poor persons who were unable to support themselves."⁵⁸ This body was changed on February 3, 1845, to the county commissioners consisting of four commissioners and one chief justice, all elected for two year terms. In the Constitution of 1845, the legislature was given power to create counties, and the legislature left this body largely intact.⁵⁹ The Constitution of 1866, Article IV, Section 17, made this general method of rule into a constitutional stipulation when it provided for four commissioners and a county judge which was to be called the Police Court of the County. In 1869, this was changed to provide for the election of five justices from precincts who would constitute the County Court and, by statutory requirements, its powers were gradually increased in the area of local administration and control. The Constitution of 1876 provided for the present stipulation, placing the County Commissioners' Court in the article establishing the judicial branch of government and thus making it part of the judiciary. Throughout the history of Texas, as a part of Mexico, as a Republic, or as a state, the governing body of the county has been closely connected with the judicial aspects of the state. The chief figure of the body has been the county judge, either as the *alcade*, the Chief Judge, the chief justice of the county courts, or, as today, the county judge and presiding officer of the County Commissioners' Court.

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

It must be stated at the outset that what is involved in this provision for this specific subject is whether or not other states have created comparable governing agents for the county which are incorporated in the judicial system of the state and which have been endowed constitutionally with judicial powers. Although it is not unknown, it is rare that the organization of the county be established in the article relating to the judiciary. Oregon, in Article VII of its constitution, organizes the governing and administrative body of the county under the article on the judiciary. West Virginia does the same thing in Article VIII of its constitution. Both of these constitutions are rather old and

⁵⁸ John Claunch, *The Government of Dallas County, Texas* (Dallas: Southern Methodist University Press, 1954), p. 3.

⁵⁹ Constitution of 1845, Article VII, Section 34.

represent a time in constitution making which corresponds closely with that of Texas. Oregon made its constitution in 1859 while West Virginia adopted its constitution in 1872.

Most of the states provide for the governing body of the county in forms other than the County Commissioners' Court. There are 27 different designations of this body. In the 3,050 counties in the United States, "1,271 bear the title of Board of Commissioners and about half that number, the second largest group, are denominated Board of Supervisors. The six most frequent titles—board of commissioners, board of supervisors, county court, commissioners' court, fiscal court, and board of commissioners of roads and revenue—together account for 92 per cent of the counties.⁶⁰ In the southern states of Alabama, Georgia, Kentucky, Tennessee, and Texas, the body is composed of the judge and commissioners.⁶¹ Kentucky and Tennessee also use a variation of this form in certain counties where the body is composed of the judges and justices of the peace. "In a few counties a single judge performs both the functions of a judicial officer, usually the judge of probate, and functions normally exercised by a county governing body. This type is found only in Arkansas and some Georgia counties, although in addition to the judge in Arkansas there is a fiscal body. . . ."⁶² Thus, the variety of governing bodies for counties can be easily seen. There seems to be an almost infinite number of ways to arrange this body. In many states the body itself will vary from county to county, as in the state of Georgia, which has a Board of Commissioners of Roads and Revenue for 118 counties, a Commissioner of Roads and Revenue for 30 counties, an officer called the Ordinary in 11 counties, and an Advisory Board in 3 counties. Alabama exhibits even more variety, for it has a special body for 15 of its special counties.

The governing body of the county may be established by constitutional stipulation, as in at least 25 of the states,⁶³ or by

⁶⁰ Bureau of The Census, Department of Commerce, *Governmental Organization No. 2, County Boards and Commissions* (Washington: Government Printing Office, 1947), p. 2.

⁶¹ *Ibid.*, p. 4.

⁶² *Loc. cit.*

⁶³ Those states providing for constitutional governing bodies of the counties are: Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky,

the legislature. Many of the states provide special types of bodies for given counties, such as Baltimore or Denver. Various methods are used in selecting the chairman of the body, some by choice of the governing body, some by constitutional stipulation as in Texas, while in other cases the legislature selects the chairman, as in Maine. The most common method used is for the governing body itself to select its chairman.

Since the County Commissioners' Court is established in the article on the judiciary, the courts of Texas have traditionally recognized that the County Commissioners' Court has judicial powers. These judicial powers are held to be of limited jurisdiction,⁶⁴ and that it is a court of record which speaks through its minutes and not through the members.⁶⁵ An order of this court, "acting judicially is a judgment of a court of record."⁶⁶

Recommendations and Conclusions. That part of Article V, Section 1, relating to the Commissioners' Court should be deleted and moved to the article on counties. This would have a tendency to clean up the constitution and place the governing body for the county in the article relating to counties. There is little reason to look upon the County Commissioners' Court as a court in the true sense of the word. Its functions are basically ministerial, for it really acts as an agent of the legislature. The legislature, if need arises, could certainly pass the necessary laws endowing this body with judicial character although most of the governing bodies of counties in the United States do not act in a judicial capacity. The inclusion of the County Commissioners' Court in this article confuses the true judicial system of Texas and it should be transferred to Article IX of the present constitution.

ARTICLE V, SECTION 8

The district court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties; forfeitures and escheats; of all cases of divorce;

Maryland, Michigan, Mississippi, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Virginia, West Virginia, Wisconsin, Wyoming, and Texas.

⁶⁴ *Bradford v. Moseley*, Com. App. 223 S. W. 171; *Doyle v. Slaughter*, Civ. App. 250 S.W. 1090; *Hill County v. Hamilton*, 273 S.W. 292.

⁶⁵ *Gano v. County of Palo Pinto*, 8 S.W. 634.

⁶⁶ *Welch v. Kent*, Civ. App. 153 S.W. 2d 284.

of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial to title to land and or the enforcement of liens thereon; of all suits for the trail of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari and all writs necessary to enforce their jurisdiction.

The district court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each County, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts' of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and general jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The district Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law.

History. Like Article V, Section 1, this, too, is a part of the great reform period of Governor James Hogg. For the purpose of this study, what is involved here is the part relating to the supervisory control of the district court over the County Commissioners' Court. This section reads:

The district Court shall have appellate jurisdiction and general supervisory control over the County Commissioners' Court with such exceptions and under such regulations as may be prescribed by law; and shall have general jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law.

This part of the article was added in 1891 to the original article. The most likely reason for this part being included in the Hogg reform was to allow a remedy at law against those county commissioners' courts who were violating citizens' rights.

The courts have not been anxious to substitute their findings for that of the Commissioners' Court. Only in cases where the Commissioners' Court has exercised its power arbitrarily, without discretion, or clearly in an abusive manner, will the district court set aside the findings of the County Commissioners' Court.⁶⁷ Such supervisory control over the judgments of the County Commissioners' Court can be invoked only when it acts beyond its jurisdiction or clearly abuses the discretion which is conferred upon it by law.⁶⁸ The higher court will not interfere with the power of the Commissioners' Court when it appears that the power has been exercised in a reasonable and fair manner.⁶⁹

Without this amendment there was a lack of jurisdiction in handling the affairs of the Commissioners' Court if one felt himself aggrieved.

Up to the time of the adoption of this amendment the principle that political questions are not a subject of judicial review operated to deprive a citizen of a county of any remedy in matters relating to the organization of a county or removal of county seats; and it has been said that the main object of the amendment was to provide a judicial review in such matters.⁷⁰

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

No similar provision can be found in the constitutions of other states. The Constitution of Oregon in Section 12 of Article VII, which establishes the judicial department, provides that the "County Court shall have the jurisdiction pertaining to Probate Courts, and boards of County Commissioners, and such powers and duties . . . as may be prescribed by law." This article was amended in 1910 and the judicial system is now created by legislative enactment except for the supreme court. No mention of supervisory control over the county governing body is made in the Constitution of West Virginia, the only other state which establishes the county governing body as part of the judicial system.

Conclusions and Recommendations. Texas seems to be the

⁶⁷ *Stovall v. Shivers*, 129 T. 256, 103 S.W. 2d 363. This case involved that alleged abuse of the apportioning of road and bridge funds among its precincts.

⁶⁸ *Tarrant County v. Shannon*, 104 S.W. 2d 4.

⁶⁹ *Cannon v. McComb*, 268 S.S. 999; *Dubose v. Woods*, 162 S.W. 3.

⁷⁰ Texas Jurisprudence, Sec. 39, See *Oden v. Barber*, 163 Texas 449; *Doyle v. Slaughter*, Civ. App., 250 S.W. 1090.

only state whose constitution establishes immediate supervisory control over the county governing body through one of its courts. The stipulation also provides for "such exceptions and under such regulations as may be prescribed by law. . . ." Thus, the legislature has the power given to it to enter this field. It is therefore recommended that the part of Article V, Section 8, relating to supervisory control over the Commissioners' Court be deleted and that the new article on the judiciary include such powers as may be necessary to endow the legislature with adequate control over the Commissioners' Court through the exercise of this power.

THE COMMISSIONERS' COURT—ORGANIZATION ARTICLE V, SECTION 18

Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. The present county courts shall make the first division. Subsequent divisions shall be made by the commissioners' court provided for by this Constitution. In each such precinct there shall be elected at each biennial election, one justice of the peace and one constable, each of whom shall hold his office for two years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8000 or more inhabitants, there shall be elected two justices of the peace. Each county shall in like manner be divided into four commissioners' precincts in each of which there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified. The county commissioners so chosen, with the county judge, as presiding officer, shall compose the county commissioners court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of this State, or as may be hereafter prescribed.

History. The County Commissioners' Court was established in its present form under the Constitution of 1876 after having undergone many changes from constitution to constitution. Although the first mention of the court is found in Article V, Sections 1 and 8, its powers and organization are not described until this present article. The county judge is established in Article V, Section 15, although this provision does not discuss his duties other than that he is to be a conservator of the peace.

Section 18 of Article V does many things in connection with the County Commissioners' Court. It establishes the basic organization of the court and its relationship to the state legislature. It also establishes the fact that each county is to be "governed" by a commissioners' court consisting of four commissioners elected from precincts and one county judge who shall preside. Their terms, by constitutional amendment in 1954, were changed to four years instead of the original two-year term. This article also does the following things:

1. It establishes the number of precincts as not less than four and not more than eight;

2. This division into precincts is to be made by the commissioners' court;

3. It provides for one justice of the peace and one constable who are to be elected for four year terms;

4. It provides that cities of 8,000 or more may have two justices of the peace;

5. The county is to be divided into four commissioners' precincts;

6. The County Commissioners' Court is to exercise such powers and jurisdiction over county business as provided by the constitution and by law.

After the first division of the county is made by the county court, the commissioners' court is responsible for future division. The commissioners' court is not compelled to redistrict as the population or property values shift.⁷¹ While making its decision regarding justice precincts the commissioner's court is a court of general jurisdiction and its determination that a precinct contains 8,000 persons or more cannot be attacked directly or collaterally in the absence of fraud.⁷² However, the district court will offer relief when the court feels the division of districts has been made disproportionate as to acreage and population for this is held to be an abuse of discretionary power.⁷³

The authority of the commissioners' court must be expressly given or implied since it is a creature of the constitution and

⁷¹ *Lewis v. Harris*, Civ. App., 48 S.W. 2d 730.

⁷² *Williams v. Castleman*, 112 T. 193, 247 S.W. 263.

⁷³ 11 *Texas Jurisprudence*, Section 32; also see *Dubose v. Woods*, Civ. App. 162 S.W. 3.

subject to regulation by the legislature.⁷⁴ By statute, a quorum has been established as any three members of the court including the county judge for the transaction of any business except that of levying a county tax. In the absence of the county judge, all of the commissioners must be present in order to constitute a quorum.⁷⁵

COMPARABLE PROVISIONS IN STATE CONSTITUTIONS

As already seen, only Texas and West Virginia establish the governing body of the county in the article on the judiciary. Oregon, who had done this at one time, has now amended its constitution and taken this provision out of the article on the judiciary.

The method of election or selection of members of the governing body of the county varies greatly. The following table will illustrate this point.

All elected at large	18%
All elected at large with district residence requirement	21
Some elected at large, some by district	21
All elected by district	29
All elected by township and/or city	10
All other	01

The office of the justice of the peace is a common judicial office in all of the states. Since this office is not really a part of the organization of the county governing body in Texas, and since the subject is to be considered elsewhere in this series, an analysis of this office is omitted in this paper.

Conclusions and Recommendations. The following conclusions can be made: (1) the commissioners' court is not a court, as such, and should not be organized in the article relating to the judiciary; (2) the article establishing the commissioners' court is not closely related to the article which discusses the

⁷⁴ *Von Rosenberg v. Lovett*, Civ. App. 173 S.W. 508; *Miller v. Brown*, Civ. App., 216 S.W. 452; *Wallace v. Commissioners' Court of Madison County*, Civ. App., 281 S.W. 593, reversed on other grounds 118 T. 279, 15 S.W. 2d 535; *Commissioners' Court of Madison County v. Wallace*, 118 T. 279, 15 S.W. 2d 535.

⁷⁵ *Vernon's Ann. Civ. St.*, Articles 2342, 2343. Also *Cobb v. Dies*, Civ. App. 203 S.W. 438.

organization of that court and which relates its powers to the constitution and to the legislature; (3) there are various ways in which the governing body of the county can be arranged and the commissioner system of Texas is not too different from any other type of governing board, especially in the southern states; (4) the county judge may or may not play a role in the governing body.

It is recommended that: (1) the sections of the constitution relating to the establishment and the organization of the commissioners' court be moved to the article relating to the counties rather than being left in the article relating to the judiciary; (2) that greater stress be placed upon the relationship of the commissioners' court to the legislature; (3) that some of the detail in this article be deleted, especially that regarding the justices of the peace and the constables, since these are basically judicial officers and relate to policing and the administration of justice.

THE COUNTY JUDGE

ARTICLE V, SECTION 15

There shall be established in each county in this State a County Court, which shall be a court of record; and there shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State; shall be a conservator of the peace, and shall hold his office for four years, and until his successor shall be elected and qualified. He shall receive as a compensation for his services such fees and perquisites as may be prescribed by law.

This article of the constitution does five things: (1) provides for the establishment of a County Court; (2) requires that a judge be elected for this court; (3) states the method of election for this judge; (4) lists his qualifications; and, (5) states that the manner of payment is to be left to the legislative body.

History. The county judge in Texas can be traced to two historical sources: the English system and the Spanish-Mexican system of rule in Texas. When Texas was joined with Coahuila for administrative purposes under the Mexican rule, the province was divided into seven departments and the entire area was in the zone of the Eastern Interior Provinces and under the Mexi-

can military officer *Perfecto de Cos*.⁷⁶ At the department level there were both civilian and military authorities to supervise administrative functions.⁷⁷ Within each department were territorial divisions known as municipalities which existed to choose deputies to the state and federal congresses as well as for administrative functions. This government was known as the *ayuntamiento* and was made up of one to three *alcades*, two to six *regidores*, and one or two *syndics*.⁷⁸ The one receiving the most votes in the municipal assembly was the most important and served as chief executive, presiding officer of the council, and as judge.⁷⁹

In 1835, when Texas severed relations with Mexico, the General Council created a new Organic Law, the Twenty-One Articles, which provided for a Provisional Judiciary for each municipality consisting of a primary judge and two substitute judges nominated by the General Council and commissioned by the Governor. In the Constitution of the Republic of Texas, 1836, this arrangement was left in tact, first by constitutional grant to create county courts and then by statutory law. Article IV, Section 10, of the Constitution of 1836 provided:

There shall be in each county a County Court and such Justice Courts as the congress may from time to time establish.

Congress immediately utilized this grant to create the inferior courts and stipulate the method by which their officers were to be chosen as well as their jurisdiction.

"There shall be established in the several counties of this Republic an inferior court of law, which shall be styled the county court of the County of ———; to be composed of one Chief Justice, who shall be elected by joint ballot of both Houses of Congress, and shall hold his office for a period of four years, and two Associate Justices, who shall be elected by a majority of the Justices of the Peace of each county from among their own body at the beginning of each and every year; and the Justices so selected

⁷⁶ Seymour Conner, "County Government in the Republic of Texas," *Southwestern Historical Review*, October, 1951, p. 164.

⁷⁷ *Ibid.*, p. 164.

⁷⁸ John M. Claunch, *Government of Dallas County, Texas* (Dallas: Southern Methodist University Press, 1954), p. 1.

⁷⁹ *Ibid.*, p. 1.

shall attend said County Courts or pay a fine assessed by the Chief Justice not exceeding one hundred dollars.⁸⁰

In 1841, the Congress made the office of Chief Justice elective. During the period of the Republic the position of the Chief Justice of the County Court was somewhat confused by laws passed by the Congress giving to him a variety of executive duties, such as the power to appoint a tax assessor, taking over the entire powers and duties of the Board of Land Commissioners when it was abolished in 1839, and being made to act, together with the associate justices, as a board of school commissioners as well as the inspector-general of school teachers.⁸¹ On February 3, 1845, the Congress passed its final act affecting the structure of counties by creating the office of county commissioners consisting of four commissioners elected for two years and a chief justice elected for a similar two-year period.⁸² The power to create counties was given to the legislature in Article 7, Section 34, of the Constitution of 1845, although there is little in this constitution about county officials and nothing in it about the commissioners or the county judge. Hence, during the period from 1845 to 1866, the legislature ruled by statute in this field. The Constitution of 1866 fully provided for this body but changed the name. Article IV, Section 17, read as follows:

There shall be elected in each county in the state, by the persons qualified to vote for members of the legislature, four county commissioners, whose term of office shall be four years, who, with the judge of the county court, shall constitute and be styled, The Police Court of the County; whose powers, duties, mode of action in regulating the county, shall be the same now prescribed by law for the Commissioners' Court of Roads and Revenue, until otherwise provided for and regulated by the legislature.

Article IV, Section 15, of the same constitution provided for the election of a judge of the county court in each county for a term of four years. The Constitution of 1869, Article V, Section 21, required the election of five precinct justices which constituted the County Court. Through legislative enactment the power of this court was increased during 1870 so that it per-

⁸⁰ H. P. N. Cammer, *The Laws of Texas* (Austin: Gammel Book Co., 1898), Vol. 1, pp. 1822-38, December 20, 1836.

⁸¹ Conner, *op. cit.*, pp. 173-175.

⁸² *Ibid.*, p. 176.

formed the duties of a probate court and most of the duties of the old police court, together with certain administrative duties such as the appointment of a county attorney, road overseers, school trustees, the licensing of teachers, and the levying of taxes.⁸³

The Constitution of 1875-76 provided the present stipulation with the exception that it originally reduced the term of office to two years. In 1954, the term was increased again to four years by constitutional amendment. The change was made to give the county judge a longer tenure in the hope of providing more continuity of policy, better training, and less confusion due to the requirement of the biennial campaign.

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

Similar provisions for a county court and a county judge are made in the following states: Arkansas, Colorado, Florida, Illinois, Kentucky, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, and Wisconsin.⁸⁴ Of course, all states provide for a comparable court in jurisdiction which may be known variously as Superior Court, Probate Court or by some other name.⁸⁵ The method of selecting these officials, as well as their term of office, varies widely from state to state. Arkansas, Colorado, Florida, Illinois, Kentucky, Mississippi, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, West Virginia and Wisconsin, have courts listed as county courts with the appropriate judgeship. Salaries vary widely—from \$300 to \$4,200 in West Virginia to \$22,000 in Illinois.⁸⁶ The method of selection varies widely; although most of the judges of the state courts are chosen on a partisan ballot many are chosen by a non-partisan ballot, while some are appointed by the Governor or some other agency including the legislature.

The Model State Constitution is silent on this issue of County

⁸³ Gammel, *op. cit.*, Vol. 7, pp. 282-5.

⁸⁴ *The Book of the States, 1958-1959*, (Chicago: The Council of State Governments, 1958), p. 106.

⁸⁵ For further information see *Ibid.*, and Legislative Reference Bureau, University of Hawaii, *Manual on State Constitutional Provisions*, 1950, pp. 195-230.

⁸⁶ *Book of the States, op. cit.*, p. 106.

Courts and County Judges. It does provide for a unified court system, leaving the creation of inferior tribunals to the legislative body.⁸⁷

Conclusions and Recommendations. Although the most popular method of selecting judges today is the elective method, there is growing sentiment toward either the appointment of judges, especially on higher judicial levels, or the mixed method of election and selection. There is no general rule to be laid down. One of the basic considerations regarding the judiciary in a democratic society has been that it be independent of the other branches of the government. This seems to have been maintained even though the method of election or selection of the judges has changed from time to time.

The basic problem is not really how to get a county judge but, rather, whether there should be one at all. It is difficult to conceive of the county judge in Texas simply as a part of the judicial system separate from the County Commissioners' Court. Thus, his functions are confused since he is a judicial administrative, and a legislative officer of the county.

THE COUNTY CLERK ARTICLE V, SECTION 20

There shall be elected for each county, by the qualified voters, a county clerk, who shall hold his office for four years, who shall be clerk of the County and Commissioners' Courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the Legislature, and a vacancy in whose office shall be filled by the Commissioners' Court until the next general election; provided, that in counties having a population of less than eight thousand persons there may be an election of a single clerk, who shall perform the duties of district and county clerks.

History. The term county clerk is derived from the English system of government where the sheriff, who presided over the county courts, appointed a clerk to take the proper notes of the proceedings of that body. The term is originally derived from the Latin *clericus* meaning clergyman. Since the clergy were at that time the chief educators, they were few among many who possessed the ability to write. The term is now descriptive of the function which the clerk performs.

⁸⁷ National Municipal League, *Model State Constitution* (New York: National Municipal League, 1954), Article 4, Section 600.

This function was also found in the Mexican court system and the individual performing it was called *escribano*, from *excribir*, to write. Hence, under the Mexican system, the term was purely descriptive, for the name referred to the one who writes. The office was made a part of the county structure under the Constitution of 1836. Legislative enactment provided for the office in each county. In December of 1836, the office was made elective for a four-year term. On December 14, 1837, a board of land commissioners was created for each county and one clerk in each county was required to record the transactions of this board. "In 1839 the board of land commissioners as such was abolished in each county and was ordered to turn over all records to the chief justice and associate justices, who together with the county clerk were designated the new board of land commissioners."⁸⁸

The Constitution of 1836, 1845, and 1861 made no mention of this specific office. The Constitution of 1866 provided for the office with a term of four years. In 1869, the office was again left out of the constitution. The office was again constitutionally created in the convention of 1875. It appears that the only disagreement at the constitutional convention was as to the population requirement of 12,000 rather than the present 8,000. A motion to compromise at 10,000 failed and the convention adopted the present requirement that in counties of less than 8,000 the county clerk may also perform the duties of district and county clerk.⁸⁹

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

The county clerk's duties in Texas are varied and not solely related to the commissioners' court, for he performs many judicial functions as well as administrative duties. He must issue all marriage licenses, administer oaths, and take affidavits and depositions to be used in any court. He is also an ex-officio clerk of the commissioners' court. He is further required to record all deeds, mortgages, and other instruments required by law for

⁸⁸ Symmour v. Conner, "The Evolution of County Government in the Republic of Texas," *The Southwestern Historical Quarterly*, LV, No. 2 (October, 1951), p. 174.

⁸⁹ S. S. McKay, *Debates in the Texas Constitutional Convention of 1875* (Austin, Texas: University of Texas Press, 1930), 433.

the keeping of an adequate record and to see that these records are properly indexed, arranged, and preserved. He has the custody of all the papers and proceedings of the courts. He keeps a record of court proceedings, compiles dockets as may be required by law, and reports on fines and jury fees at the end of each term of the county court.⁹⁰

To make a judgment on the comparable provisions of other states regarding the governing body of the county is almost impossible. Most of the states provide for a clerk to properly record the proceedings of the court involved. Some states require the election of a register of deeds as in Delaware, Indiana, Iowa, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah and Wisconsin.⁹¹

The office has been provided for constitutionally in the following states: Arkansas, California, Colorado, Florida, Illinois, Indiana, Michigan, Mississippi, Montana, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Virginia, Texas, West Virginia, and Washington.⁹²

The term of office and the method of compensation will vary. Some states, *e.g.*, Arkansas, require a two-year term. California leaves the term to the legislature, while West Virginia provides for a six-year term. The method of compensation will vary only slightly, for most of the states require a salary to be fixed by the legislature or the county governing board. The method of compensation based on the fee system has largely, although not entirely, disappeared, for fees and/or per diem are paid in Illinois, Minnesota, Mississippi, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Washington, and Wisconsin.⁹³ Some of these officers are the register of deeds; others are township clerks. In those states where there exists a clerk for

⁹⁰ These duties are summarized from *Vernon's Texas Statutes*, 1948, (Kansas City, Mo.: Vernon Law Book Company, 1948), Title 41, articles 1935 through 1948.

⁹¹ Bureau of Census, Department of Commerce, *Governmental Organization*, No. 4, Vol. 1, *Elective Offices of State and Local Governments* (Washington: Government Printing Office, 1957).

⁹² Legislative Drafting Research Fund of Columbia University, *Index Digest of State Constitutions* (New York: Columbia University, 1959), pp. 155-158.

⁹³ Bureau of Census, *op. cit.*

the judicial system, the term of office for the clerk will correspond generally with that of the judge.

Recommendations and Conclusions. It is recommended that this part of Article V be deleted. The legislative body should be given the power to regulate this office or, if it wishes, to allow the commissioners' court to do so. Most of the duties as listed in the constitutional provision are later repeated in the civil code with some enlargement upon the office and power.

THE SHERIFF

ARTICLE V, SECTION 23

There shall be elected by the qualified voters of each county a sheriff, who shall hold his office for the term of four years, whose duties, and prerequisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the Commissioners' Court until the next election. (Adopted November 2, 1954).

The sheriff is the oldest of the county officers, dating back in Anglo-Saxon history to the time of Alfred the Great. During this period, there existed an individual whose function was that of general overseer of a manorial estate. The name of reeve was applied to this individual. As the shire became the important unit of administration under the king, the reeve of the shire, or sheriff, became the most important person in this administration. The title itself dates back at least to 1016, when the sheriff was termed the *scíregeréfan*.⁹⁴ By the time of the Norman conquest the office of the sheriff had been consolidated. The Norman kings changed the relationship of the sheriff so that he became a complete instrument of the crown. This was done and the sheriff began to be a steward, a bailiff, an overseer, the chief administrator of the king in the shire, the perserver of the king's peace, and the tax collector. In certain shires the sheriff had the power to appoint certain deputies to aid him in his duties. This office was gradually hedged in by other appointments by the king, such as the coroner. The sheriff's duty "of receiving writs, summoning juries, and executing judgments is as old as the common

⁹⁴ Johannis M. Kemble, *Aevi Saxonici Codex Diplomaticus* (London: Sumptibus Societates, 1846), Vol. IV, p. 10.

law itself, and remains the most important part of his work."⁹⁵

The introduction of the English sheriff into America came through Pennsylvania in 1705.⁹⁶ In Texas, under the Mexican rule, this office was performed by the *alquacil*.⁹⁷ This office was turned into the Anglo-Saxon version in the Constitution of 1836 which provided for one sheriff per county to be elected for a two-year term. "The sheriff originally was to serve both as assessor (under direction of a board of commissioners) and collector of taxes, but the law permitting him to appoint deputies could have been construed as creating special deputies responsible for these functions,"⁹⁸ and so the office of county tax assessor was soon created. In the Constitutions of 1845 and 1861, the sheriff was appointed for a two-year term. The Constitutions of 1866 and 1869 made him elective for a four-year period. The Constitution of 1876 originally made him elective for a two-year period but, in 1954, this term was changed, along with the term of other county officers, to four years.

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

All of the states except Rhode Island have made provisions for the establishment of the office of the sheriff. This does not include Hawaii, or Connecticut which recently abolished the counties. Ten states mention the office but leave the details to the legislature except in those counties under home-rule and in those combined cities and counties. Special provisions relating to the sheriff are made for certain counties or cities in the Constitutions of Louisiana, Maryland, Massachusetts, Missouri and New York. The most common plan is to make provisions for the large cities such as New Orleans, Boston, St. Louis.

The most common term of office for the sheriff is four years. This is the case except in Arizona, Arkansas, Delaware, Idaho, Iowa, Kansas, Maine, Michigan, New Hampshire, New Mexico, North Dakota, South Dakota, Tennessee, Vermont and Wis-

⁹⁵ *Vernon's Annotated Constitution of the State of Texas* (Kansas City, Mo.: Vernon Law Book Company, 1955), Vol. 2, p. 314.

⁹⁶ *Loc. cit.*

⁹⁷ Seymour V. Conner, "The Evolution of County Government in the Republic of Texas," *The Southwestern Historical Quarterly* (October, 1951), Vol. LV, No. 2, p. 166.

⁹⁸ *Ibid.*, p. 172.

consin. All of the above mentioned states have a two-year term. New Jersey and New York have established a three-year term and Massachusetts has a six-year term. The most common method of obtaining a sheriff is by election at-large from a county or recognized legal division, such as the City of Boston. This method is, in fact, universal except for the optional plan in New York. The most common method of compensation for the sheriff is a fixed salary although some states provide for additional income for travel and expenses. Alabama, Arkansas, Kentucky, Minnesota (in those counties of less than 75,000 population), and North Carolina, are the states which compensate on a fee basis. The other states may supplement the salary with expenses or civil fees.

The following states make no mention of the office of sheriff in their constitutions: Alaska, Georgia, Iowa, Minnesota, New Mexico, and Nebraska.

Recommendations and Conclusions. This article could be moved to the article relating to counties as such. If there is need to make provision for the sheriff as well as other local officers the legislature should be given the power to do so. This is already done in the present section which states that "duties, and perquisites, and fees of office, shall be prescribed by the Legislature. . . ." The legislature has done this in the Revised Civil Codes, Title 120, Article 6865 through 6877. The most appropriate constitutional stipulation regarding local officials is the statement found in the Constitution of Minnesota. Article XI, Section 4, of the Minnesota Constitution reads as follows: "Provision shall be made by law for the election of such county or township officers as may be necessary."

ASSESSOR AND COLLECTOR OF TAXES

ARTICLE VIII, SECTION 14

Except as provided in Section 16 of this Article, there shall be elected by the qualified voters of each county, an Assessor and Collector of Taxes, who shall hold his office for four years and until his successor is elected and qualified; and such Assessor and Collector of Taxes shall perform all the duties with respect to assessing property for the purpose of taxation and of collecting taxes, as may be prescribed by the Legislature.

This section has been amended twice since its original adoption in the Constitution of 1876. In 1932, the duties and title were changed to Assessor and Collector of Taxes, and in 1954 the term of office was lengthened to four years instead of the original two which were provided for county officers.

History. The collection and assessment of taxes has traditionally has been done by someone appointed by the executive. In the English shire the sheriff was appointed by the king to assess and collect taxes. As the development toward more responsible government took place, this function was vested in the hands of various individuals or boards. The historical development of the office in Texas parallels the development of the office in most of the states. In those countries having a population of less than 10,000 the sheriff still acts as the assessor and collector of taxes.

The office was originally created on a constitutional basis in Article VII, Section 29. This article stated: "The Assessor and Collector of Taxes shall be appointed in such manner and under such regulations as the Legislature may direct." This provision was retained through the various constitutions until 1869 when the office was separated and the justices of the peace served as assessors while the sheriff served as collector. The Constitution of 1876 made the office of the tax assessor and the tax collector elective offices but separated them. An amendment was accepted in 1932 which became effective in 1935, making the office elective for two years. As already mentioned, this was changed in 1954 to four years.

COMPARABLE PROVISIONS IN OTHER STATE CONSTITUTIONS

Similar provisions for a tax assessor is made in the constitutions of the following states: Arizona, Colorado, Florida, Idaho, Kentucky, Louisiana, West Virginia and Wyoming. Some states make provisions for the separation of the office and functions, such as treasurer, or tax collector, as is done in Colorado and Florida, respectively. The treasurer seems to be a more popular constitutional provision than does the assessor, for the treasurer is found in each of the constitutions of the following states: Arizona, Colorado, Florida, Idaho, Illinois, Indiana, Kansas,

Louisiana, Massachusetts, Michigan, North Dakota, Pennsylvania, South Dakota, and Vermont.

Conclusions and Recommendations. It is recommended that this office be deleted from the Constitution of Texas and that the office and its functions be determined by legislative enactment.

THE SHERIFF AS ASSESSOR AND COLLECTOR OF TAXES ARTICLE VIII, SECTION 16

The Sheriff of each county, in addition to his other duties, shall be the Assessor and Collector of Taxes therefor; but, in counties having 10,000 or more inhabitants, to be determined by the last preceding census of the United States, an Assessor and Collector of Taxes shall be elected as provided in Section 14 of this Article, and shall hold office for four years and until his successor shall be elected and qualified.

History. The history of this section of the Constitution is identical to that of Section 14 of this Article.

Conclusions and Recommendations. It is recommended that this section of the Constitution be deleted.

COUNTIES MAY CREATE ASSESSOR-COLLECTOR OF TAXES ARTICLE VIII, SECTION 16a

In any county having a population of less than ten thousand (10,000) inhabitants, as determined by the last preceding census of the United States, the Commissioners' Court may submit to the qualified property taxpaying voters of such county at an election the question of adding an Assessor-Collector of Taxes to the list of authorized county officials. If a majority of such voters voting in such election shall approve of adding an Assessor-Collector of Taxes to such list, then such official shall be elected at the next General Election for such Constitutional term of offices as is provided for other Tax Assessor-Collectors in this State.

History. This amendment, adopted in 1954, represents the final break of the relationship between the sheriff and the collector of taxes. This amendment was passed to allow those counties of less than 10,000 inhabitants to provide for the separation of this function from the sheriff if his combined duties became too burdensome. At the time of adoption of this amend-

ment ninety-six counties had less than 10,000 inhabitants.⁹⁹ No other state constitution makes a similar provision.

Conclusions and Recommendations. It is recommended that this section of Article VIII be deleted and that the office of tax assessor and collector be created by legislative enactment.

COMMISSIONERS' COURT AS EQUALIZATION BOARD

ARTICLE VIII, SECTION 18

The Legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation, (the County Commissioner's Court to constitute a board of equalization); and may also provide for the classification of all lands with reference to their value in the several counties. [Sic]¹⁰⁰

History. This section is a constitutional limitation and was adopted by the Constitutional Convention of 1875 as a reaction against forms of corruption and abuse under previous constitutions, especially the Constitution of 1869. The policy of the government regarding taxation has been a frequent source of corruption and abuse, for it is here that the citizen has the most to lose or gain. Hence, the taxing policy of the state, as well as that of the local governments, has been subjected to frontal assaults.

The commissioners' court has, by this article, become involved with the fiscal policy and affairs of the state. As the commissioners' court becomes thus involved the state legislature loses some of its control over the finances of the state and both the executive and the legislative departments suffer from this. Having neither ideal morality nor ideal law, man is forced to accept the next thing and this constitutional stipulation seems to be a reasonable, although not ideal, way to guard against abuse of the taxation power on a local level.

It is questionable whether or not the commissioners' court can accurately ascertain the true and just value of taxable property. (This is the function of the assessor, and the commissioners' court acts as a court of appeals for those who feel the assessment to be

⁹⁹ *Vernon's Annotated Constitution of the State of Texas* (Kansas City, Mo.: Vernon Law Book Company, 1955), Vol. 2, p. 564.

¹⁰⁰ *Vernon's Constitution of the State of Texas Annotated* (Kansas City, Mo.: Vernon Law Book Company, 1955).

unjust.) The commissioners' court is also to see that privileges in tax assessments do not exist. This function cannot be done by the legislature and for this reason the legislature has made the commissioners' court its agent in this matter.

The administration fallacy or weakness of the system as it now exists is that both the tax assessor and collector and the county commissioners' court are politically elected officers. This means that different offices develop policies of assessment based on political decisions. Since the raising of money and the purposes for which this money is to be spent are political questions of primary consideration, it would be more efficient and politically expedient to devise an administrative and political structure in which the political questions would be voted on only once. As it is now the commissioner is elected on a precinct basis while the assessor and the county judge are elected on a county-wide basis. Thus, the commissioner is interested in the political consequences of the tax rate and assessment of the property in his respective precinct while the assessor is interested in the property assessments throughout the county. Each has, in effect, a different constituency. It would be better to divide this aspect into administrative functions and legislative functions so that the commissioners' court would be responsible politically for the tax valuation of property while the tax assessor would be responsible for the administration of such tasks as directed by the commissioners' court.

Conclusions and Recommendations. It is recommended that this section of the Constitution be left as is.

COUNTY TREASURER AND COUNTY SURVEYOR

ARTICLE 16, SECTION 44

The Legislature shall prescribe the duties and provide for the election by the qualified voters of each county in this State, of a County Treasurer and a County Surveyor, who shall have an office at the county seat, and hold their office for four years, and until their successors are qualified; and shall have such compensation as may be provided by law.

History. The office of the surveyor was created in 1837 as a

part of the General Land Office in each county.¹⁰¹ One surveyor was provided for each county with the right to appoint a deputy.¹⁰² The surveyor was appointed by the legislature until 1840.¹⁰³ After this time the surveyor became an elected office with a term of two years. In 1954, this term was changed to four years.

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

Comparable provisions are found in the constitutions of the following states: Arizona, California, Colorado, Florida, Idaho, Kentucky, Maine, Pennsylvania, South Dakota, and West Virginia. Eight of these states elect for a four-year term while the others elect for a two-year term. Salaries may either be prescribed by law or fixed by the local governing body such as the town or county.

Conclusions and Recommendations. It is recommended that this section of the constitution be deleted and the appointment of the surveyor be left to the County Commissioners' Court.

THE TREASURER

History. The office of the county treasurer was first created by legislative enactment on January 16, 1840.¹⁰⁴ Prior to this time the county clerk had acted as treasurer. The constitutional provision was added in the Constitution of 1876.¹⁰⁵ In 1954, the term was changed by constitutional amendment to four years.

COMPARABLE PROVISIONS IN OTHER CONSTITUTIONS

The following states provide for the county treasurer on a constitutional basis: Arizona, California, Colorado, Idaho, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, North Dakota, Pennsylvania, South Dakota, and Vermont.

¹⁰¹ Seymour V. Conner, "The Evolution of County Government in the Republic of Texas," *The Southwestern Historical Quarterly*, Vol. LV, No. 2, October, 1951, p. 174.

¹⁰² *Vernon's Texas Statutes*, 1936 (Kansas City, Mo.; Vernon Law Book Company, 1936), Articles 5284, 5285, and 5286.

¹⁰³ H. P. N. Gammel (comp.) *The Laws of Texas, 1822-1897* (10 Vols., Austin, 1898), II. 437.

¹⁰⁴ Conner, *op. cit.*, p. 175.

¹⁰⁵ Joe Ericson, *Inquiry into The Texas Constitution*, unpublished doctoral thesis, Texas Technological College, 1957, p. 205.

The most popular method of selection is the election on a county wide basis for two year terms.

Conclusions and Recommendations. It is recommended that this section be deleted and that the legislature provide by general law for the office of county treasurer, preferably by appointment of the commissioners' court.

The stipulations pertaining to counties are scattered throughout the constitution and have no logical order or relationship. They should be brought together in one article or section on local government.

The detailed nature of the governmental structure should not be fixed in the constitution; rather, it should be left to the legislature, the governing body of the county, or preferably, the people of a county through home rule powers.

INSPECTOR OF HIDES AND ANIMALS

ARTICLE XVI, SECTION 65

The office of Inspector of Hides and Animals, the elective district, county and precinct offices which have heretofore had terms of two years, shall hereafter have terms of four years; and the holders of such offices shall serve until their successors are qualified.

History. This provision was added in 1954 to take care of those county and district offices whose term of office was to be lengthened to four years.

Conclusions and Recommendations. It is recommended that this provision of the Constitution be deleted.

GENERAL RECOMMENDATIONS AND CONCLUSIONS

The stipulations pertaining to counties are scattered throughout the constitution and have no logical order or relationship. They should be brought together in one article or section on local government.

The detailed nature of the governmental structure should not be fixed in the constitution; rather, it should be left to the legislature, the governing body of the county, or preferably, the people of a county through home rule powers.



